No. 337.

Brief of Hanchett for D. E.

SUPREME COURT

Filed Feb. 26, 1897.

UNITED STATES.

MICHIGAN LAND AND LUMBER COMPANY, Limited,
Plaintiff in Error,
vs.
CHARLES A. RUST, Survivor,
Defendant in Error.

No. 337.

BRIEF IN BEHALF OF DEFENDANT IN ERROR.

BENTON HANCHETT,
Attorney for Defendant in Error.

Seemann & Peters, Printers, Saginaw, Mich.

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Defendant in Error.

No. 331.

BRIEF IN BEHALF OF DEFENDANT IN ERROR.

Recovery by ejectment is sought in this suit of the undivided one-half of the following described lands, situated in township eighteen (18) north, range three (3) west, in the State of Michigan, viz:

The southeast quarter of the southeast quarter of section twenty (20), the northwest quarter of the southwest quarter of section twenty-one (21), the northwest quarter of the southeast quarter of section twenty-two (22), the northwest quarter of section twenty-eight (28), and the northeast quarter of section thirty-five (35).

As to the other lands described in the declaration, the plaintiff discontinued the suit on the trial, and claimed to recover for only an undivided half of the lands above described.

Record pp. 15 and 40.

The claim of the plaintiff is that the land inured to the State of Michigan under the swamp land grant of September 28th, 1850, entitled "An Act to enable the State of Arkansas and other states to reclaim the swamp lands within their limits."

9 U. S. Statutes at Large, page 519.

The statute provides as follows:

"Sec. 1. That, to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be and the same are hereby granted to said state."

"Sec. 2. That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make an accurate list and plats of the lands described as aforesaid, and transmit the same to the Governor of the State of Arkansas, and at the request of said Governor, cause a patent to be issued to the state therefor; and on that patent the fee simple to said lands shall vest in said State of Arkansas, subject to the disposal of the Legislature thereof. ***Provided, however***, that the proceeds of said lands, whether from sale, or by direct appropriation in kind, shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid."

"Sec. 3. That in making out a list and plats of the lands aforesaid all legal subdivisions, the greater part of which is 'wet and unfit for cultivation,' shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom."

"Sec. 4. That the provisions of this act be extended to and their benefits be conferred upon each of the other states of the Union in which such swamp and overflowed lands, known as designated as aforesaid, may be situated."

In order to execute the provisions of this act and designate the lands, which, by the terms of the act, pass to the state, the Commissioner of the General Land Office sent to the Surveyor-General instructions for making out lists of the lands, of date November 21st, 1850, which is Exhibit 3 A, p. 17, and sent a copy of the instructions to the Governor of the state by Exhibit 3, p. 16.

These instructions say, page 18, "The only reliable data in your possession from which these lists can be made out are the field notes of the surveys on file in your office, and if the authorities of the state are willing to adopt these as a basis of those lists, you will so regard them. If not, and these authorities furnish you satisfactory evidence that any lands are of the character embraced by the grant, you will so report them. The following general principles will govern you in making up those lists, to-wit:

Where the field notes are the basis and the intersections of the lines of swamp or overflow with those of the public surveys alone are given, those intersections may be connected by straight lines, and all legal subdivisions, the greater part of which are shown by these lines to be within the swamp or overflow, will be certified to the state; the balance will remain the property of the government. * * And in every case, under each rule or principle herein prescribed, forty-acre lots or quarter-quarter section will be regarded as the legal subdivisions contemplated by law."

The instructions further directed that the Surveyor-General make out lists of these lands as early as practicable according to a form furnished, one copy of which he was to

transmit to the land officers and another copy to the Commissioner of the General Land Office. The lands selected should be reserved from sale, *and after those selections are approved by the Secretary of the Interior*, the register should enter all the lands so selected in his tract books as "granted to the state by Act 28th September, 1850, being swamp or overflowed lands," and on the plats enter on each tract "State Act 28th September, 1850." Copies of the approved lists to be sent to the register for this purpose.

The State of Michigan, by Act No. 187 of the Laws of 1851, page 322, "adopt the notes of the surveys on file in the Surveyor-General's office as the basis upon which they will receive the swamp lands granted to the state by an act of Congress, September 28th, 1850."

The process of designation of the lands adopted was as follows: The Surveyor-General, from the field notes of the surveys on file in his office, made a plat of the lands, and where swamps were shown by these minutes to intersect section lines on more than one side of the section, lines were drawn from each exterior intersection of the swamp at the section lines across the section to the intersection of the swamp lines upon the other side of the section, and all the territory between these lines so drawn was treated as swamp. Each forty acres intersected by these lines was treated as swamp where it appeared that the greater part of the forty came within the lines. Lists were made of the lands found in this manner to be swamp, and copies thereof were sent by the Surveyor-General to the register of the United States Land Office of the district in which the lands lay, for him to designate which of the lands in the list had been sold by the United States prior to the date of the grant.

These lists, with the annotations of the land officers, were then transmitted to the office of the Commissioner of the General Land Office, to be there compared with the tract books in that office, and clear lists made out of the lands falling to the state under the law, in that office.

See Exhibit 9, pp. 22 and 23, and Exhibit 12, p. 25.

When the list had been perfected in the office of the Commissioner of the General Land Office, it was presented to the Secretary of the Interior for approval. *Upon approval by him, a copy of the list, so approved,* was transmitted to the Governor of the State, *and upon request of the Governor patents were issued to the State for the lands contained in the list. A copy of the same approved list was also sent to the* register of the land office in the district in which the lands were situated.

See Exhibit 23, pp. 31 and 32.

In this manner the *original list* sent by the Surveyor-General to the Commissioner of the General Land Office remained in that office. The *original of the list approved by the Secretary of the Interior* also remained in that office. The Surveyor-General retained a copy of the list made out by him in his own office.

The records and files of the Surveyor-General's office, upon the business of that office being closed, were transmitted for safe keeping to the office of the Commissioner of the State Land Office at Lansing, Michigan, on May 15th, 1858, and February 6th, 1860. It was in this manner that the files from the Surveyor-General's office came to be found in the office of the Land Commissioner at Lansing, Michigan.

Record page 27.

The lands in this township, eighteen (18) north, range three (3) west, as appears by the field notes put in evidence by the plaintiff, were surveyed prior to March 13th 1839.

See Exhibit 30, pp. 40 to 47, at p. 47.

In 1842 attention was called to the fact that frauds had been committed in the original surveys on many of the lands in the State of Michigan, and proceedings were taken, on the application of the State of Michigan, by the United States to ascertain the extent of these frauds, and to resurvey the lands where the original surveys were found to be defective. *The work of resurveying began before the passage of the swamp land grant of September 28th, 1850, and was carried on from year to year down to 1857.*

When the reports of these surveys were made to the office of the Surveyor-General, lists of lands coming within the swamp land grant were made *from the resurveys instead of from the minutes of the original surveys.*

It was decided by the United States authorities that the reports made after the resurveys were the only proper evidence upon which their action must be based in determining the grant.

It was also decided that where lists had been made and approved, based upon the original surveys, *and patents had been issued for lands contained in such approved lists,* no changes would be made *in such townships on account of the resurveys, but in all other cases the resurveys were to govern, and in cases where lists had been made up and had been approved, but the lands had not been patented, such lists should be corrected by the resurveys and the patents issued upon lists made up and approved from such resurveys.*

See Exhibit 23, p. 31, plaintiff's evidence, being the letter

from the General Land Commissioner, Thos. A. Hendricks, to S. B. Treadwell, Commissioner of the State Land Office, of date Dec. 22, 1858.

Accompanying this letter of Commissioner Hendricks was a list showing the townships in which the tracts, as reported to the Commissioner of the General Land Office, from the evidences of the original surveys, *had been approved and patented* (*page 33.*)

Also a list of the townships in which the tracts as reported to the Commissioner of the General Land Office, from the evidences of the original surveys, *had been approved but not patented* (p. 33 and 34.) In this list said township 18 north, range 3 west, appears as one of the townships in which there had been an approved list, but where no patent had been issued. In such cases the declaration of Commissioner Hendricks (*page 32*) is as follows:

"Since such approvals were made and certified, the surveyors general, upon the evidences of the resurvey of many townships, have forwarded lists *to supersede and abrogate the reports made in townships described therein.*

"These subsequent selections differ materially from the former ones.

"The patents for probably one-half of the townships in this condition as originally selected and reported, were prepared and transmitted prior to the receipt of the subsequent reports based upon the evidences of the resurveys.

"The balance of the selections originally made, and which are superseded by reports under resurveys, have been approved and certified, *but are not carried into patent, nor can they be as thus approved, for the reason that the reports made after the resurveys are the only proper evidence upon which our action must be made in determining the grant.*"

See also Exhibit 24, page 34, which is a letter from the Commissioner of the General Land Office to the Commissioner of the State Land Office, dated December 27th, 1871, and Exhibit 25, page 34 and 35, which is a letter from the Commissioner of the General Land Office to the Register and Receiver at Detroit, dated September 6th, 1877.

The plaintiff bases the right to recover upon the following evidences:

First. Exhibit 15, (p. 26) a letter from the Commissioner of the General Land Office, John Wilson, to the Governor of Michigan, dated January 13th, 1854, saying that he transmits "a certified copy of list No. 1, of swamp and overflowed lands, selected as inuring to the state, in the district of lands subject to sale at Ionia, taken from the original on file in this office, which on the 27th day of October, 1853, was approved by the Secretary of the Interior."

Second. Certain schedules and receipts (p. 27) showing that the field notes, maps, etc., appertaining to the surveys of the United States in the Surveyor-General's office, were transmitted to the State Land Office of Michigan.

Third. A certified copy from the General Land Office of the Surveyor-General's list No. 1, of Grand River Land District, dated March 29th, 1852, which is Exhibit 26, page 36. The entire of the lands in the Exhibit are not printed. Only the lands in the township in question, viz: 18 north, range 3 west, are printed.

These two facts will be noted in regard to this Exhibit:

1st. It is stated in the certificate of the Surveyor-General to the Exhibit, that "the districts reported by Judge Burt and Hiram Burnham to be fraudulent, are embraced in this list and marked 'F'." The mark "F" is at the head of the list of lands of the town in question. (Page 36.)

2d. On the right hand margin of the list is the following note: "Note—This selection in town 18 appear to be superseded by the supplemental list No. 3."

Fourth. Exhibit 27, page 37, which is approved list No. 1, of the Ionia Land District, which was approved October 27, 1853, (p. 39) and the list referred to in said Exhibit 24, (p. 34.) This is a certified copy from the General Land Office of the original approved list on file in that office.

These points are to be observed in relation to this Exhibit, viz: In printing the Exhibit, only the township in question is included, the other townships being omitted.

Fifth. Exhibit 30, page 40 to 47, being the field notes of the original survey of town eighteen (18) north, range three (3) west.

Sixth. A plat of the survey of township eighteen (18) north, range three (3) west, from the records of the State Land Office. Exhibit 31, p. 47.

Seventh. A map of the Ionia Land District. Exhibit 32, p. 47.

Eighth. The testimony of Oscar Palmer, Register of the United States Land Office at Grayling, Michigan, (p. 48)

who produced the tract book in use in that office, embracing town eighteen (18) north, range three (3) west, and being inquired of in relation to the southeast quarter of the southeast quarter of section 20, the northwest quarter of the southwest quarter of section 21, the northwest quarter of the southeast quarter of section 22, the north half of the northeast quarter of section 35 (p. 48), he says (p. 48):

"It appears that the descriptions read have been at some time selected as swamp lands and cancelled, selected under List No. 1, and there appears to be a red mark through it."

He further says (p. 48): "The plat book is another record from my office. It shows the original and resurvey, the original plats being cancelled."

On p. 49, he says in relation to this township, "The indication that there has been a resurvey, is that on the original plat, written across the face is the word 'resurveyed,' and followed by the resurveyed plat."

Referring to his tract book, and speaking of the southeast quarter of the southeast quarter of section 20, he says what appears on that tract book in reference to that description is "the first entry includes the entire south half of the southeast quarter of the section, 80 acres swamp land under act of the 28th of September, 1850, approved. See List No. 1.

Q. What condition is that in?

That is cancelled by a red line drawn through the entire entry." (P. 50).

He further says (p. 50, 51) that the further entries upon his tract book show that the southeast quarter of the southeast quarter of section 20 was purchased by William A. Rust at $362.00, November 12th, 1869, patented to William A. Rust, May 10th, 1870.

The northwest quarter of the southwest quarter of section 21 was purchased by William A. Rust at $400.00, November 12th, 1869, patented to William A. Rust May 10th, 1870.

In reference to the northwest quarter of the southeast quarter of section 22, the tract book shows the entire south half of section 22, placed as swamp land under the act of September 28th, 1850. Cancelled the same as the others with a red line, and sold at $340.00 to Wm. A. Rust, November 13th, 1869, and patented to him May 10th, 1870.

With reference to the northwest quarter of the northwest quarter of section 28, it shows the entire northwest quarter included in the swamp land list the same as the others, and cancelled the same, and sold to Wm. A. Rust for $492.00, November 13th, 1869, and patented to him May 10th, 1870.

The north half of the northeast quarter of section 35 was included in the same swamp land list and cancelled the same, and sold to Addison P. Brewer at $100.00, October 31st, 1866.

He further says (p. 51): Wm. A. Rust made the purchase referred to at a public sale. In reference to the plat book, which is marked "resurveyed," he says: "This resurvey plat is certified to May 12th, 1858, and in our office is recognized as the existing plat, and the one now in force. No other plat recognized in the office as in force. There are indications on that plat of resurvey of state swamp lands, indicated in the same manner, that they are upon the plat of the original survey. And upon the plat of the resurvey some of the same pieces of land are marked with the letters indicating swamp land that are marked upon the plat of the original survey. According to the plat of resurvey and the marks indicating the state swamp lands, the southeast of the southeast quarter of section 20 is not state swamp land and the northwest quarter of the southwest quarter of section 21 is not. The northwest of the southeast of 22 is not.

The northwest of the northwest of section 28 is not, and the north half of the northeast quarter of section 35 is not."

On page 53 he testifies as follows:

"Q. Do not the entries upon the face of the resurveys show that the lands were sold by that, and that that plat was the plat recognized by the government from the time of the resurvey down?

A. Certainly.

Q. Does it now show upon its face sales made by the government prior to the time you took possession?

A. Yes, sir.

Q. So that records of your office would show all the plats of the resurvey?

A. Only from June 3d, 1858, the date it was received at the land office. It was certified May 12th, 1858. The plat of resurvey shows it was resurveyed in 1856 by Geo. H. Cannon, Deputy Surveyor. The month is not given."

Ninth. Exhibit 33, p. 53, and Exhibit 34, p. 54, which are patents from the Governor of the state to Edward W. Sparrow, including the lands in question in this suit, bearing date the 14th day of October, 1887.

Tenth. Exhibit 35, p. 55, a deed from Edward W. Sparrow to the plaintiff, including the lands in question, bearing date the 31st day of October, 1887.

Eleventh. The testimony of Geo. W. Doxie, p. 57, showing that he examined the lands in January, 1887, for Mr. Sparrow, and that they were then wild and uncultivated and were worth two thousand dollars and over.

Twelfth. Exhibit 37, page 59, Exhibit 38, page 60, and Exhibit 39, page 60, which are patents from the United States to Wm. A. Rust, of the lands in controversy on sec-

tions 20, 21, 22 and 28, and several mesne conveyances showing a conveyance of an undivided one-half of said lands to Amasa Rust and Charles A. Rust, also Exhibit 51, page 63, which is a patent from the United States to Addison P. Brewer, conveying the land in question in section 35, also mesne conveyances, page 64, showing the conveyance of an undivided one-third of said land to Amasa Rust and Charles A. Rust.

THE EVIDENCE ON THE PART OF THE DEFENDANTS.

FIRST.

THE DEFENDANTS GAVE EVIDENCE SHOWING THAT IN 1842, THE UNITED STATES AUTHORITIES WERE INFORMED BY THE ACTION OF THE LEGISLATURE AND GOVERNOR OF MICHIGAN THAT GROSS FRAUDS HAD BEEN COMMITTED IN THE SURVEYS WHICH HAD BEEN MADE OF LANDS IN THE STATE, AND THAT THE UNITED STATES AUTHORITIES, ACTING THEREON, PROCEEDED TO ASCERTAIN WHETHER SUCH FRAUDS HAD BEEN COMMITTED, AND UPON EXAMINATION MADE, DETERMINED THAT THEY HAD BEEN COMMITTED, AND TO CORRECT THEM, MADE RESURVEYS, WHICH WORK WAS CARRIED ON FROM YEAR TO YEAR UNTIL 1857, AS FOLLOWS :

1st. Exhibit 57, page 64, a letter from the Governor of Michigan to the President of the United States, dated February 3, 1842, inclosing a joint resolution of the Legislature of Michigan in relation to the resurvey of certain townships of land therein mentioned.

The resolution recites that "Whereas, it has been satisfactorily made to appear to this Legislature *that large districts of lands* lying within the limits of the State of Michi-

gan, have been returned by some of the Deputy United States surveyors to the General Land Office as surveyed, *where no surveys whatever have been made, or where the surveys have been so imperfectly done as to be utterly valueless;* and Whereas, the United States Surveyor-General of this land district has caused the lands so represented as surveyed to be offered for sale, *to the very great injury of the State of Michigan and the citizens thereof, therefore,*" *it* was resolved "That the President of the United States be requested to cause the subdivisions of the following townships of land, situate within the State of Michigan, and which have been represented to have been surveyed, but which have either not been surveyed, or have been so imperfectly surveyed that said work is valueless, to be surveyed at as early a day as may be consistent, viz:"

Certain towns are specified, including in all eighty-one townships. It was further resolved that the Governor be requested to transmit such preamble and resolution to the President of the United States.

The letter bore the endorsement "Referred by President of U. S."

2d. Exhibit 58, page 65, which is a letter from the Commissioner of the General Land Office to the President, referring to said letter of the Governor and resolution of the Legislature, in which he recommends to the President "that a copy of the memorial be immediately referred to the Surveyor-General at Cincinnati, for a full report of all the facts which it may be in his power to furnish, on receipt of which, an immediate examination of portions of the field work by one of his most trusted deputies could, if considered expedient, be ordered," etc.

Endorsed upon this recommendation of the Commissioner

is the President's order referring it to the Surveyor-General, and that the Governor be informed of the measures to be adopted. A copy of the instructions was sent to the Governor of Michigan.

3d. Exhibit 59, pp. 67 to 68, which is a letter, dated February 21, 1842, from the Commissioner of the General Land Office to the Governor, inclosing instructions sent by him to the Surveyor-General at Cincinnati, requesting the Surveyor-General to make a full report of all the facts in his power.

4th. Exhibit 60, p. 68, which is a response by the Surveyor-General, dated March 4, 1842, in which it appears (p. 69) that intimations had been received in the summer of 1840, by the Surveyor-General, that frauds had been committed in the surveys, and he recommends (p. 71) that an experienced deputy surveyor, say Mr. William A. Burt or John Mullett, be employed to go on the ground and examine *each township, or a sufficient number of them in each district to satisfy himself concerning the whole, and ascertain and report the exact condition of the surveys in each.*

On pages 71 and 72 he explains the process by which frauds may be committed in the surveys, and the return of the field notes of the survey so made, that the fraud could not be detected in the Surveyor-General's Office.

5th. Exhibit 61, pp. 74 to 75, which is a letter from the Commissioner of the General Land Office to the Governor of Michigan, dated April 2, 1842, informing him of the report which had been made by the Surveyor-General, and inclosing a copy of the instructions which had been issued by the

Commissioner of the General Land Office to the Surveyor-General upon the receipt of the report of the letter.

By these instructions to the Surveyor-General, he is requested to send an experienced deputy surveyor to go on the ground and examine *each township, or a sufficient number of them in each district to satisfy himself concerning the whole*, and ascertain and report the exact condition of the surveys in each, and if it should be found that the surveys in the townships indicated, or any of them, are defective in field work, *then new surveys in all such cases should be made, etc.*

6th. Exhibit 62, page 75, which is a letter of instructions from the Surveyor-General to William A. Burt, dated April 11th, 1842. After referring to the resolution of the Legislature of Michigan, and the action by the President and the Commissioner of the Land Office thereon, and the information obtained by his own inquiries, he says (p. 76): "It is very probable, from the respectable source whnce the information now obtained emanates, that fraud to a greater or less extent has been practiced on the office and on the public interests, and, of course, false returns made. *To ascertain whether this be a fact, and to what extent those frauds exist, is the object for which I now commission you.*"

He directs him to proceed and make examination of the towns referred to in the resolution of the Legisature.

7th. Exhibit 63, p. 77, which is a letter from the Surveyor-General to the Commissioner of the General Land Office, dated August 1st, 1842, in which it is said that "Mr. Burt has executed the trust assigned to him and made his report to this office, and I herein transmit to you a copy thereof together with a copy of the Surveyor-General's instructions to him. The report of Mr. Burt, you will see, *furnishes*

abundant proof that the surveys examined by him are grossly defective and fraudulent, and there is a high probability that the remaining townships in the same contracts, not examined by Mr. Burt, are as defective as those which he inspected."

8th. Exhibit 64, p. 78, which is a letter from the Commissioner of the General Land Office to Hon. A. S. Porter, who was a United States Senator from the State of Michigan, dated October 4th, 1842. After referring to the report mentioned in the preceding exhibit, he says: "From all which it appearing that the surveys, as far as examined, *were found grossly defective and fraudulent, it is designed to issue instructions from this office for the necessary resurveys in a few days.*"

9th. Exhibit 65, pp. 78 to 79, which is a letter from the Surveyor-General to the Commissioner of the General Land Office, dated April 27th, 1843. After referring to the communication of the Commissioner of the General Land Office to him, by which he was instructed to take measures to cause the surveys to be corrected and completed, and advising him that the sum of four thousand dollars had been set apart for that object, he says, "It is shown by Mr. Burt's report, that in the townships examined by him a very small portion, if any, of the lines had been surveyed or marked; and what was found to have been done was so erroneous and defective that little or none of it can be relied upon, *but nearly all will have to be resurveyed and marked.*"

He further suggests that the sum set apart will not be sufficient for the work.

10th. Exhibit 66, p. 79, which is an extract from the report of the Surveyor-General for the year 1843, in which there is recommended the appropriation of $10,400 "for re-

surveying erroneous and defective surveys north and west of Saginaw Bay, Michigan."

11th. Exhibit 67, pp. 80 to 82, which is a letter from William Woodbridge, who was then United States Senator for Michigan, to the Commissioner of the General Land Office, dated September 16th, 1844, showing measures that he had taken to get appropriations for resurveys in Michigan, to remedy what he describes "outrageous frauds in the surveys," and in which he says: "The great and increasing evils suffered by the State of Michigan, by suffering these false returns of surveys, alluded to above, to remain without correction, I am sure I need not press upon your consideration. *They are of incalculable extent, and have already produced a deep feeling of wrong done throughout our state.*"

12th. Exhibit 68, pp. 82, 83, ~~107~~, which is a letter from the Commissioner of the General Land Office to Hon. Wm. Woodbridge, dated September 30th, 1844. After referring to the amount of the appropriation apportioned to be expended "in correcting the fraudulent surveys north and west of Saginaw Bay," he says: "*All the other cases of erroneous or defective surveys in Michigan will be examined and instructions issued as speedily as they can be prepared.*"

13th. Exhibit 69, p. 83, which is a letter from the Commissioner of the General Land Office to the Register and Receiver of the United States Land Office of Genesee, Michigan, dated October 1st, 1844, in which he says: "I am advised that from circumstances which are not explained, you cannot sell the lands north and west of Saginaw Bay by the new and corrected surveys, *but only by the old, false and*

fictitious ones. You will please to advise me if such is the fact, and the cause of it.

The plats of the fraudulent surveys should have been canceled immediately on the receipt of the plats of the new surveys, and proper references made on them to these new plats, *so that the plats of the fraudulent surveys should not be used under any circumstances.*"

14th. Exhibit 70, pp. 83, 84, which is a report from the Commissioner of the General Land Office for the year 1844, in which it appears that the resurveys to the extent authorized has been completed, and says further: "Your instructions of the 20th ultimo directs the continuance of the resurveys in that quarter to a limited extent, and contemplates their completion when the necessary appropriations shall be made by Congress," and estimates $8,500 "for resurveying forty-four townships of erroneous and defective surveys west of Saginaw Bay, Michigan."

Also an extract from a like report for the year 1845, (p. 84), in which it is said the work of resurveying will be put under contract "as soon as practicable, so far as the appropriation of ten thousand dollars, made by the act of the 3d of March last will pay for it." It contains an estimate of $5,880.00 "for resurveying fourteen townships of erroneous and defective surveys west of Saginaw Bay, Michigan."

Also an extract from the report for the year 1846, (p. 85), in which quoting from Surveyor-General's Report it is said, "In the southern peninsula of Michigan, thirty-two townships of erroneous and defective surveys, north and west of Saginaw Bay, have been resurveyed, and the township plats made and transmitted to the General Land Office. * * * There is reason to believe, however, *that many of the surveys heretofore made in the northern portion of the peninsula are erroneous and fraudulent, and that resurveys will have to be*

made to a very considerable extent. Examination ought now to be made of the suspected districts, *in order that resurveys, if necessary, may be made before the sales of lands shall embarass the proceeding.*"

Also an extract from a like report for the year 1847, (p. 85), quoting from the Surveyor-General's report, as follows: "*The more the old surveys in the northern part of the peninsula are examined, the more ceatain it appears that a large portion of them has been so loosely and fraudulently made, that extensive resurveys will be necessary.*"

Also an extract from a like report for the year 1848, (p. 86), in which, quoting from the Surveyor-General's report, after referring to resurveys of four townships which were originally surveyed by John P. Allard, and part of the townships originally surveyed by John Brink, it is said: "From these returns, and the testimony of the men who assisted the surveyors in making the resurveys which they describe, it appears that Allard's field notes of his survey of those townships *are almost wholly fictitious and fraudulent, and that Brink's are, to some considerable extent, of the same character.*"

He further says that Allard had three contracts, embracing in all thirty-two entire townships, and that Brink had two contracts, making together about twenty-four townships.

The report further says, "There are other surveys in this portion of the state that are strongly suspected, but enough is not known at present to justify the expression of any positive opinion against them."

It incloses an estimate of an appropriation of ten thousand dollars "for the correction of erroneous and defective surveys in southern Michigan."

15th. Exhibit 71, p. 87, which is a letter from the Commissioner of the General Land Office to Hon. Alpheus Felch, United States Senator for Michigan, dated Feb. 17th, 1840.

saying that he had sent a letter to the Chairman of the Committee of Public Lands, requesting him to have introduced in the general appropriation bill, an item of ten thousand dollars "for the correction of erroneous and defective surveys in southern Michigan."

16th. Exhibit 72, p. 87, which is a request of the Commissioner of the General Land Office, dated Feb. 17th, 1849, made to the Chairman of the Committe on Public Lands for the appropriation of said sum of ten thousand dollars for the correction of erroneous and defective surveys in southern Michigan.

17th. Exhibit 73, pp. 88 to 89, which is a letter from the Surveyor-General to the Commissioner of the General Land Office, dated July 10th, 1849, in which he says, "I beg leave to say that from examinations that have been made by Wm. A. Burt *within the last three months, it appears that most of the field notes* originally returned to this office by H. Nicholson, N. Brookfield and J. Brink, as containing a true description of surveys made by them under their respective contracts, dated 20th of July, 1838, 30th of November, 1839, and 13th of December, 1839, *are fictitious and fraudulent.*"

After recommending an entire new survey, he says (p. 88): "The districts above referred to are all bounded on the east by the principal meridian, and lie between townships 17 and 24 North, in the State of Michigan."

THIS DISTRICT, THUS DESCRIBED, INCLUDES THE TOWN IN QUESTION, 18 NORTH, RANGE 3 WEST.

H. Nicholson was the Deputy Surveyor who surveyed said township. (See plaintiff's Ex. 30, p. 40 at p. 47.

The letter continues, (p. 88) and after saying that Mr. Burt is still in the wilderness pursuing his examinations, and

Orange Risdon is making similar examinations, he says: "I consider such an examination as they are making indispensably necessary to enable the government to know *what frauds have been committed by surveyors in Michigan.*"

He further says (p. 89): "I have returns from Mr. Burt up to the 3rd of last month, *and the surveys of every district, and of almost every township examined by him previous to that date proved to be fraudulent, as before stated.*"

18th. Exhibit 74, pp. 89 to 96, which is an extract from the report of the Commissioner of the General Land Office for 1849, which, quoting from the Surveyor-General's report, by which it appears that William A. Burt and Orange Risdon were employed to examine, and for that purpose were furnished with copies of plats "of about two hundred and eighty townships," says: "The district assigned to Mr. Burt extended from the south boundary of township seven north, in range one west, north and west of Grand Traverse Bay of Lake Michigan."

THIS DISTRICT WOULD COVER THE TOWNSHIP IN QUESTION.

He further says (pp. 89, 90, ~~117~~) "field notes have been received from Mr. Burt describing examinations made by him in districts originally surveyed by Robinson Thomas, C. W. Christmas, Joel Wright, Henry Nicholson, J. N. Higbee, Noah Brookfield, John Brink, Henry Brevoort, Jr., Jas H. Mullett, John P. Allard, Slyvester Sibley and John Hodgson, which districts are numbered on an accompanying diagram."

Among other things, he states (p. 90) that the returns of surveys in seven districts, "embracing ninety-one townships, *are grossly fraudulent, the greater portion of the field notes thereof being wholly fictitious, or descriptive of lines and corners that were never established.* For a more particular account of the surveys examined by Mr. Burt see statement N."

He further says: "It is probable that at least one hundred

and fifty townships would require to be resurveyed in this peninsula."

Statement N, annexed to the report, appearing on pages 94, 95 and 96, includes township eighteen (18) north, range three (3) west, which is the town in question in this suit, as surveyed by Henry Nicholson. Opposite of this township, in the margin, is this statement (p. 95): "This district was *contracted for by Mr. Nicholson in 1838*, the next year after he had made his returns of the one described above, and his work in it is found to be no better, but rather worse than it was in that. *Examinations were made in every township, and there can be no doubt that it is bad throughout.*"

The record states (p. 96) that the document marked P, referred to in the foregoing exhibit (p. 96) is a map accompanying the foregoing report, showing the territory covered by contracts in schedule "N," showing town eighteen (18) north, range three (3) west, to have been covered by Henry Nicholson's contract.

This report estimates an appropriation of twenty thousand dollars for resurveying and correcting erroneous and fraudulent surveys in Michigan, in addition to the unexpended balance of former appropriations for this purpose. (P. 96.)

19th. Exhibit 76, p. 100, which is an extract from Executive Document No. 2, Senate, quoting from the report of the Commissioner of the Land Office for 1850, which on page 101 contains an estimate of ten thousand five hundred dollars, appropriation for resurveying and correcting erroneous surveys in the Lower Peninsula of Michigan, and after referring to various townships which have been put in contract for resurvey, the report says (p. 102): "Resurveys have also been made in other districts that were reported fraudulent in the field notes of examinations made last year, but as those examinations were made in a superficial manner, giv-

ing, it is true, sufficient evidence of the imperfect character of the original surveys in each district, but not in every township, the deputies intrusted with the resurveys, were required before commencing the resurvey of any township, to ascertain the character of the old surveys, *and not to make any resurveys where they were unnecessary*."

On page 103, an estimate of resurveying twenty-five townships in the Lower Peninsula of Michigan, of ten thousand five hundred dollars is stated.

At page 103, the record states that "schedule 'D,' annexed to the report, is a map of the State of Michigan, entitled 'Sketch of the Public Surveys in Michigan,' and shows state of surveys in Michigan, and indicates the towns that are defectively surveyed. *18–3 West is indicated on the map as defectively surveyed.*"

20th. Exhibit 77, p. 103, which is a letter from the Surveyor-General to the Commissioner of the General Land Office, dated March 5, 1851. After referring to the appropriations made for the resurvey, and that the resurvey should be made either by an entire resurvey, or by re-establishing and correcting old surveys as far as practicable, the report says (pp. 103, 104): "The latter method is preferable and perhaps indispensable, where sales have been made in a township, but in other cases where the old surveys are very defective, and the lines and corners much out of place, it is believed an entire new survey should be made without reference to the old work, except to mention such portions of it as came within the observation of the deputy making a survey, for the expense and labor of re-establishing and correcting old lines is found to be nearly, if not quite, equal to that of making an entire resurvey. The office work, on account of these fraudulent surveys, is in an unsettled and unfinished condition."

21st. Exhibit 78, p. 105, which is an extract from the report of the Commissioner of the General Land Office for the year 1851. Referring to the swamp land grant, the report says (p. 105): "Whenever the selections in any one land district shall be completed and closed, *and the lists finally approved, and not before*, it is designed to issue the patent required by the act."

On page 106, referring to the resurveying which is now going on, the report says: "It is deemed of the greatest importance that such resurveys as are necessary to be made in this district, should be ordered with as little delay as practicable."

On page 106, the report says: "The injury to the government in consequence of *the frauds committed in the surveys in this state*, consists not only in the pecuniary loss on account of the surveys, but in the false reports of the character of the country, some of the finest portions of which being represented in the original surveys as indifferent, second and third rate land, *and sometimes swamp*, have been rendered unsaleable for many years."

22d. Exhibit 79, p. 107, which is a letter from the Surveyor-General to the Commissioner of the General Land Office, dated Feb. 10th, 1852. This letter refers to a letter of the Commissioner of the General Land Office of the preceding November 25th, requesting a plan of operation in reference to the resurveys (p. 107.) The Surveyor-General recommends for resurvey for the present season (1852)to "carry on as far as possible to completion the resurveys in the Lower Peninsula, beginning with the district west of Saginaw Bay as of the first importance, it being situated in the country where the sales are constantly making, and continuing with the districts nearest Grand Traverse Bay until all are completed." (P. 107.)

On page 109, the Surveyor-General again refers to his "plan of operations for the resurvey of the present season."

On page 109, he says: "It would, therefore, appear that in any of the defective or fraudulent surveys *the marks of the original surveys should not be respected, but obliterated, making entire new surveys of such districts and connecting them with the adjoining regular surveys so as not to interrupt the regularity of the townships and ranges.*"

This letter contains a report of the Surveyor-General made by A. S. Wadsworth, Deputy Surveyor, on the character of the country between Grand River and the Straits of Mackinaw, which includes territory covering the township in question, 18 north, range 3 west, which report says (p. 110): "The entire section of country has, until recently, been considered low, level *and swampy*, with pine, cedar, balsam and hemlock ridges, cold, sterile and unfit for cultivation. The furthest possible from this are the facts in referenece to this region."

23d. Exhibit 80, p. 112, which is a letter from the Commissioner of the General Land Office to the Surveyor-General, dated March 8th, 1852. Referring to the "subject of the resurveys in Michigan, which it is designed to undertake the coming season. The surveys about to be undertaken will be designed to remedy two classes of defects and frauds.

"First Class—Incomplete surveys." * * *

"Second Class—Fraudulent surveys (p. 112). Where there is no evidence found in the field of any good intent on the part of the Deputy Surveyor to comply with the terms of his contract, no system being manifest in the field work, and an entire absence of marks and monuments whereby to designate the corners, and where no lines are traceable.

In this class of cases the lines will have to be run and corners established, as if originally, *and all the old irregular*

lines and corners must be most carefully and thoroughly obliterated."

24th. Exhibit 81, p. 113, which is an extract from the report of the Commissioner of the General Land Office for the year 1852.

This report (p. 114) contains "Estimates for the appropriations for the surveying department, for the fiscal year ending June 30th, 1854.

To defray the expenses of examining and correcting old, imperfect and defective surveys in the northern part of the Lower Peninsula of Michigan, three thousand dollars."

The Surveyor-General's report in this exhibit, speaking of the resurveys, says (p. 115, ~~52~~): "The resurveys of the past season, some of the townships of which are situated in both the Grand River and Saginaw land districts, *will require new lists in conformity with your instructions of the 4th ultimo.* These lists, which will be supplemental, will be made up as soon as practicable after the plats of the resurveys are made."

Again the report says (p. 115): "In some instances in *the original survey, lakes covering many hundred acres, have been laid down upon the maps where none existed,* thus covering with water a large area of beautiful country, which, but for these frauds, might long since have been opened for sale and settlement.

There are upwards of sixty townships, situated east of the meridian, which have been reported fraudulent, and no doubt exists in reference to the bad condition of the surveys. The old districts of subdivisions, situated east of the meridian and north of the third correction line, have been partially examined, and there is reason to believe that the surveys therein are, to a great extent, fraudulent."

25th. From the report of the Commissioner of the General Land Office for the year 1853. (Page 115 at page 116.)

It contains an "estimate of appropriations for the surveying departments, for the fiscal year ending June 30th, 1855."

"For continuing the examinations and corrections of old, imperfect and defective surveys in the Lower Peninsula of Michigan, north of the third correction parallel, and east and west of the meridian, being forty-eight townships, twenty thousand one hundred and sixty dollars."

On page 117, the Surveyor-General's report, speaking of examinations and resurveys made, says: "In the townships resurveyed and corrected, portions of the lines were run and found to be established; other lines were run, but seemed never to have been corrected, *while other portions of the survey were found to be entirely fraudulent, no lines ever having been run.*"

On page 118, this report further says: "The examinations in the four districts embraced in my present estimate represent that in many of the townships no lines have ever been run. They also serve to show, as all examinations of defective surveys in this State have ever done, *that the field notes of the original surveys are no index to the true and real character and value of the country of which they purport to give a faithful description.*"

"*Instances are numerous where valuable agricultural and pine lands are found to exist in places of what has been reported as dense, and in some cases, impassable swamp or nearly worthless lands.*"

26th. The report of the Commissioner of the General Land Office for the year 1854, (p. 119) in which he says (p. 119): "The Surveyor-General of Michigan has successfully overcome most of the difficulties incident to the fraudulent

surveys heretofore made, *and is pursuing the only plan by which the evils resulting therefrom can be remedied.*"

On page 119, the Surveyor-General says: "It will be necessary to make other resurveys than those now estimated for, but they have been left for another season, as I believe the true policy in carrying on this work to be to undertake no more than can be contracted to deputies whose experience, etc., have been tested and approved."

The report contains an "estimate for resurvey in the Lower Peninsula for the year ending June 30th, 1856, ten thousand eight hundred dollars." (p. 119.)

27th. Report for the year 1855 (p. 119), extract from Surveyor-General's report. This report refers to the passage of the Act of August 4th, 1854, making an appropriation for continuing the resurveys in this state.

It further says (p. 120): "As early in the spring of 1855 as it was practicable to enter the field, Mr. Cannon resumed his work, and contracts were made as fast as practicable with deputies of experience for the resurvey and correction of fifty-six townships and fractional townships."

At page 120 the report says: "*The resurveys have cancelled all the old office work that may have heretofore been done in such townships*, consequently they erroneously represent the real condition of office labor in those towns."

This report, at page 120, contains a "statement and estimate of uncompleted field work in the State of Michigan, on the 1st of December, 1855, exclusive of that under contract, as represented by statement A, accompanying this report."

This statement of uncompleted field work contains the following (p. 120): "Townships 18, 19 and 20 north, 1, 2 and 3 west, character of work, resurvey." (Town 18 north, range 3 west, is the town in question.) Under the head of

remarks, opposite these townships, appears the following: "It is intended to contract all this work as fast as appropriations will admit, and experienced and reliable deputies can be found to undertake surveys of the character of those now remaining to be done."

The same report, at page 121, contains an estimate of appropriations for the year ending June 30th, 1857, for the resurvey of seven townships, two thousand seven hundred and thirty dollars, and for the correction and resurvey of eighteen townships, seven thousand and twenty dollars, making a total of nine thousand seven hundred and fifty dollars.

28th. Report for the year 1856 (p. 122) from the report of the Commissioner of the General Land Office, which says: "It has been determined to complete the resurveys of about 75 townships, the greater portion of which are embraced in outstanding contracts, to complete the archives and then close the office. For the attainment of this object, measures are contemplated so as to be able to turn over the archives to the authorities of Michigan, under the Act of the 12th of June, 1840, by the 30th of September, 1857."

The Surveyor-General's report says (p. 122): "That it is not to be inferred that in the opinion of that office *no other defective, imperfect or fraudulent surveys exist in Michigan than those for the resurvey of which appropriations have been made*, but that it is well known that there are several contracts, both in the Upper and Lower Peninsula of the State, in which the surveys are in places defective, and in some cases fraudulent."

29th. It will be observed that the resurvey of the township in question, 18 north, range 3 west, was resurveyed in 1856. See field notes, Ex. 114, pp. 159 to 168 at p. 168.

30th. Exhibit 82, p. 126, which is a letter from the Surveyor-General to the Commissioner of the General Land Office, dated June 11th, 1847, which (p. ~~169~~ 126 referring to the instructions of the Commissioner of the General Land Office to report the quantity of swamp lands unfit for cultivation, that has been surveyed and returned as public land in each land district, says (p. 126):

"The old surveys made in this district do not furnish data even sufficient for that; *for the extent of the swamp on either side of the lines passing through them, is not noted, either on the plats or in the field notes.*"

SECOND.

The defendant put in the following evidence which shows that the course taken, where resurveys were made and reported was this: THE RESURVEYS TOOK THE PLACE OF THE OLD SURVEYS IN THE GOVERNMENT OFFICES, AND WHERE LISTS HAD BEEN MADE OF SWAMP LANDS IN A TOWNSHIP BASED UPON THE MINUTES OF THE ORIGINAL SURVEY, UPON WHICH LISTS NO PATENT HAD BEEN ISSUED FOR ANY OF THE LANDS IN THE TOWN, NEW LISTS WERE MADE FROM THE RESURVEYS, WHICH NEW LISTS SUPERSEDED AND ABROGATED THE LISTS MADE FROM THE ORIGINAL SURVEYS, AND STOOD IN THE PLACE OF THEM, AND UPON SUCH NEW LISTS THE PATENTS WERE ISSUED. WHEN THE LIST MADE UPON THE RESURVEY WAS ADOPTED THE OLD LIST WAS TREATED AS NULL AND VOID FOR ALL PURPOSES.

1st. Exhibit 69, p. 83, which is a letter from the Commissioner of the General Land Office to the Register and Receiver at Genesee, Michigan, in which he says: "The plats of the fraudulent surveys should have been cancelled

immediately on the receipt of the plats of the new surveys, and proper references made on them to these new plats, *so that the plats of the fraudulent surveys should not be used under any circumstances.*"

2d. Exhibit 79, pp. 107 to 112, which is a letter from the Surveyor-General to the Commissioner of the General Land Office, dated February 10th, 1852. At page 109, he says: "It would, therefore, appear that in any of the defective or fraudulent surveys the *marks of the original survey should not be respected, but obliterated*, making entire new surveys of such districts and connecting them with the adjoining regular surveys so as not to interrupt the regularity of the townships and ranges."

3d. Exhibit 80, p. 112, which are the instructions from the Commissioner of the General Land Office to the Surveyor-General, of date March 8th, 1852. At page 112, he says: "In this class of cases (fraudulent surveys) the lines will have to be run and corners established as if originally, *and all the irregular lines and corners must be most carefully and thoroughly obliterated.*"

4th. Exhibit 81, p. 113, which is from the report of the Commissioner of the General Land Office for the year 1852. At page 115, he says: "The resurveys of the past season, some of the townships of which are situated in both the Grand River and Saginaw land districts, will require new lists, in conformity with your instructions of the 4th ultimo. These lists, which will be supplemental, will be made up as soon as practicable after the plats of the resurveys are made."

He further says (p. 115): "The work which has been finished, has been executed in a manner highly satisfactory, and

fully confirms the opinions heretofore expressed in former reports from this office, that much of the country heretofore represented in the original surveys as indifferent, second and third rate land, *and swamp and lake*, is proven by the resurveys, to be among the choicest land in the Lower Peninsula of Michigan."

5th. The report of the Surveyor-General for the year 1853, at page 118, referring to the examinations made in four districts, says: "They also serve to show, as all examinations of defective surveys in this state have ever done, *That the field notes of the original surveys are no index to the true and real character and value of the country of which they purport to give a faithful discription.* Instances are numerous where valuable agricultural and pine lands are found to exist in place of what has been reported as dense, and in some cases impassable swamp or nearly worthless lands."

Again, the Surveyor-General says, in his report for the year 1855, p. 120: "The resurveys *have cancelled* all the old office work that may have heretofore been done in such townships, consequently they erroneously represent the real condition of office labor in those towns." He says, on the account of this, he has prepared an entire new map of the state.

6th. Exhibit 91, page 133, which is a letter of instructions from the Commissioner of the General Land Office to the Surveyor-General, dated October 4th, 1852, in which the Commissioner directs as follows (p. 133): "In making out supplemental lists, embracing the swamp lands in the townships recently surveyed, you will prepare three copies, one for your own office, one for the proper register, and one for this office.

In those townships resurveyed during the past season, it will be necessary to furnish new lists, in explanation of the former ones, *but you will be careful to designate them as having been made in lieu of the former ones.*"

7th. Exhibit 83, page 126, which is a letter from the Commissioner of the General Land Office to the Surveyor-General, dated June 7th, 1853, which says: "In adjusting the swamp land selections in the Grand River district, (Mich.) a difficulty has arisen in regard to the proper construction of the supplemental list transmitted to this office, dated December 8th, 1852. In my letter of 4th of October last, the following directions were given: 'In those townships resurveyed during the past season, it will be necessary to furnish new lists, in explanation of the former ones, *but you will be careful to designate them as having been made in lieu of the former ones.*'

This instruction appears to have been lost sight of, as the supplemental list above referred to, is simply headed 'Supplemental list of swamp lands, etc.' * * * The questions, as you will perceive from the foregoing, are whether the supplemental list is to be regarded as only corrective of the former list, or whether it is to be taken entirely in lieu of the original in the corresponding townships. As the work upon this list has been suspended on account of the foregoing difficulties, I have to request that you will give the matter your early attention, and that you will be explicit in your answer as to the proper construction of said supplemental list."

8th. Exhibit 92, pages 133, 134, is a reply to the foregoing letter from the Surveyor-General to the Commissioner of the General Land Office, dated June 24th, 1853, and says:

"In making the supplemental list of swamp lands in townships resurveyed and platted up to December 6th, 1852, your instructions of 4th of October, 1852, were carefully observed, but it should have been stated either at the head of the list, or in the letter transmitting it, that it was intended to be placed on file in your office *in lieu of the former list.* IN ALL CASES OF RESURVEYS, A LIST OF SWAMP LANDS IS MADE UP FROM THE PLATS OF RESURVEYS WITHOUT ANY REFERENCE WHATEVER TO THE OLD PLAT OR TO THE ORIGINAL LIST MADE OUT FROM THE LOT (OLD) PLATS. The question as to whether the original or the supplement list should govern, it was supposed would be decided at your office. As the question is submitted, however, it seems to me that the supplemental list, if made at all, should in all cases govern, and in fact, it should be placed in lieu of the original list as the plats of resurveys take the place of the original plats whenever any plats are made of resurveyed townships. IN ALL THE LISTS HEREAFTER TO BE MADE UP AND FORWARDED, WHERE THE ORIGINAL LIST HAS ALLREADY BEEN SENT ON, THE SUPPLEMENTAL LIST WILL BE CONSIDERED AS A SUBSTITUTE FOR THE ORIGINAL, TO TAKE ITS PLACE ON THE FILES, MAKING THE ORIGINAL LIST OF NO MORE ACCOUNT THAN ARE THE PLATS OF THE ORIGINAL SURVEY."

9th. Exhibit 86, p. 128, which is a letter from the Commissioner of the General Land Office to the Register at Ionia, dated September 5th, 1853, which, after stating that certain descriptions named in township 8 north, range 2 west, Ionia district, are confirmed swamp selections and will hereafter be approved as such to the state, says: "The east half of the southeast quarter of section 23, north half of northwest quarter of section 24, and north half of southeast quarter of section 30, same township and range, were also selected *but will*

not be approved, the same not appearing in the subsequent list of the Surveyor-General, which was to supersede the one previously made."

10th. Exhibit 93, p. 134, which is a letter from the Surveyor-General to the Commissioner of the General Land Office, dated October 29th, 1853, which says: "I transmit herewith supplement list No. 2 of swamp lands in the Grand River land district. I have, in obedience to your instructions, *indicated in the heading of this list that it is intended to abrogate and supersede all lists of swamp lands heretofore made of townships contained within it.*"

11th. Ex. 94, p. 134, which is a reply by the Commissioner of the General Land Office to the Surveyor-General to the last exhibit, dated November 7th, 1853, saying: "Your letter of the 29th ultimo, transmitting supplemental list of swamp and overflowed lands in the Ionia district, Michigan, intended to abrogate and supersede all lists of swamp lands heretofore made of townships contained within it, has been received, *The original list will be altered so as to conform to said supplemental list.*"

12th. Ex. 95, p. 135, which is a letter from the Surveyor-General to the Commissioner of the General Land Office, of date January 31st, 1855, which says: "I inclose herewith a list of the swamp and overflowed lands in the Cheboygan land district, contained in townships surveyed and platted up to January 15th, 1855, which townships have not been included in any former list. With this list it is believed that a description of the swamp and overflowed lands in every township in this state have been transmitted to your department.

UP TO THE PRESENT TIME AS FAST AS TOWNSHIPS HAVE BEEN RESURVEYED, NEW LISTS OF THE SWAMP LANDS IN SUCH TOWNSHIPS HAVE BEEN PREPARED FROM PLATS OF THE NEW OR RESURVEY, AND FORWARDED TO YOUR OFFICE, AND TO THE PROPER DISTRICT LAND OFFICER, TO SUPERSEDE AND TAKE THE PLACE OF THE LIST BEFORE PREPARED AND FURNISHED FROM THE PLATS OF THE OLD ~~AND~~ or FRAUDULENT SURVEYS. I have now to ask whether it will be proper to continue to furnish as heretofore new lists of the swamp lands in townships that may hereafter be resurveyed."

13th. Exhibit 96, p. 135, which is a reply from the Commissioner of the General Land Office to the Surveyor-General to the last Exhibit, dated Feb. 12th, 1855, which after acknowledging the receipt of the letter and accompanying lists, says: "In reply to the inquiry made by you, I would state that it will be necessary for you to continue, as heretofore, TO FURNISH NEW LISTS OF THE SWAMP LANDS IN TOWNSHIPS RESURVEYED TO SUPERSEDE AND TAKE THE PLACE OF THOSE PREPARED FROM THE DEFECTIVE OR FRAUDULENT SURVEYS."

14th. Exhibit 144, p. 202, which is a letter from the Commissioner of the General Land Office to THE GOVERNOR OF MICHIGAN, dated June 26th, 1880, replying to a letter from the Governor in relation to a list of lands. He says: "I have to state that the list referred to was superseded by a list reported from resurveys made in 1853. * * * And the lands described in the list sent by you *are not included in the list made from the resurveys, consequently are not recognized as swamp selections, and the state of Michigan has no right thereto under and by virtue of said superseded list.*"

15th. Exhibits 145 and 146, pp. 203 and 204, which comprise a letter from the Governor of Michigan to the Secre-

tary of the Interior, dated July 27th, 1881, inclosing a list of lands as approved to the state, which list includes certain lands described, situated in townships 18 north, 3 west, 19 north, 3 west, 28 north, 3 west, 30 north, 9 west, and 36 north, 2 west, and requesting a patent for the same; and the reply to the letter made by the Commissioner of the General Land Office, in which he says that the lands *have not been patented, "for the reason that the surveys under which they were selected, being found to be defective, a resurvey of the townships was made, and a new list of swamp land selections was reported thereunder, superseding the former list, in which said lands do not appear. They are, therefore, not recognized as swamp selections, and cannot be treated as such."*

16th. Exhibits 147 and 148, pp. 205 to 206, which are of like character of the two last exhibits above, in which a letter is written by the Governor of Michigan to the Commissioner of the General Land Office, inclosing a list, and requesting patents, to which the Commissioner of the Land Office replies, under date of March 29th, 1882. After explaining in relation to certain tracts, he says (p. 206): "The following and remaining tracts described in your list were selected and reported to this office as swamp land in 1852, but subsequently the townships in which these lands are situated were resurveyed, *on the ground that the original surveys were fraudulent*, and new lists of swamp selections were made out, *which superseded the old*, and which do not contain the described tracts. * * * In view of the foregoing and the fact that the lands above described have been disposed of by the government, I am unable to comply with your request."

THIRD.

THE DEFENDANT PUT IN THE FOLLOWING ADDITIONAL EVIDENCE SHOWING THAT THE UNITED STATES AUTHORITIES REFUSED, IN ALL CASES, TO RECOGNIZE TWO LISTS OF LANDS, ONE MADE UP FROM THE OLD SURVEYS AND THE OTHER FROM THE RESURVEYS, IN ANY TOWNSHIP.

1st. Exhibit 6, p. 20, which is a letter from the Surveyor-General, Charles Noble, to the Governor of Michigan, dated January 3d, 1851, in which he says: "I cannot find in the law of Congress, or in the instructions to me from the General Land Office, *any authority for designating a portion of the swamp lands from the notes of the surveyors returned to this office, and a portion by a resurvey. My construction of the instructions were that the whole were to be designated either in the one way or the other.*"

2d. Exhibit 121, pp. 173 and 174, which is a letter from the Commissioner of the General Land Office to the register at Detroit, dated June 18th, 1864. In answer to inquiries in relation to a list made up from the resurveys in a township where a list had been made from the old surveys which had been approved and a portion of the selections patented to the state, based upon such approved list, he says: "The supplemental list D, to which you refer, was made from the resurveys and was originally intended to abrogate or supersede the old list in the townships contained in said supplemental list D, but inasmuch as the selections under the old surveys in that portion of Detroit district had been acted upon *and carried into patent*, that course was found to be impracticable. *As this office cannot recognize two lists of swamp selections for the same townships made from different and conflicting surveys*, and having, as stated, acted upon one, *we must of necessity ignore the other.*"

3d. Exhibit 122, p. 174, which is from the report of the Commissioner of the General Land Office for 1864, in which after saying that in certain townships swamp selections were made from the field notes of the original surveys, and subsequently resurveys were made, and from the plats of the latter, other and different selections in the same township were reported, the report says: "Prior to the reception of these we had approved *and patented* to the state most of the selections made under the old or defective surveys. *New selections cannot, therefore, be admitted in the same townships where the first or old ones had been patented.*"

4th. Exhibit 143, p. 201 to 202, which is comprised of a letter from the Register and Receiver at Detroit, sending to the Commissioner of the State Land Office, under date of September 10th, 1877, a letter to them from the Commissioner of the General Land Office, of date September 6th, 1877, which letter, after referrring to the fact that certain lands were included in a supplemental list made from a resurvey in townships where lists had been made upon the original survey, which lists had been approved and patents issued thereon, says (p. 202): "*As this office cannot recognize two lists of swamp selections for the same townships made from different and conflicting surveys, and having, as stated, acted upon one, we must of necessity ignore the other.*"

5th. Exhibit 149, p. 207, which is a letter from the Commissioner of the General Land Office to the Register and Receiver at Detroit, dated March 25th, 1887. Referring again to a case where selections had been made from the old survey and the selections approved, *and a portion of them patented* to the State, and a new list had been made out, based on the resurveys, he says (p. 208): "*As this office*

cannot recognize two lists of swamp land selections for the same townships, made from different and conflicting surveys, and having, as stated, acted upon one, we must of necessity ignore the other."

FOURTH.

THE DEFENDANT PUT IN EVIDENCE THE FOLLOWING RECORDS RELATING TO THE LANDS IN TOWNSHIP 18 NORTH, RANGE 3 WEST, THE TOWNSHIP IN QUESTION, SHOWING THAT A RESURVEY WAS MADE OF THE LANDS IN THIS TOWNSHIP, AND A LIST OF THE SWAMP LANDS WAS MADE THEREFROM WHICH WAS APPROVED, AND WHICH SUPERSEDED THE LIST MADE UPON THE ORIGINAL SURVEY, UNDER WHICH SUPERSEDED LIST THE PLAINTIFF CLAIMS TO RECOVER. THE STATE, ON ITS PART, ASSENTED TO AND ACCEPTED THE RESURVEY AND THE LIST OF SWAMP LANDS MADE THEREFROM.

THE LANDS INCLUDED IN THE LIST MADE UPON THE RESURVEY WERE PATENTED TO THE STATE UPON THE REQUEST OF THE GOVERNOR OF THE STATE. THE LIST MADE UP ON THE RESURVEYS, APPROVED, AND PATENTED, DID NOT INCLUDE THE LANDS IN QUESTION.

1st. Exhibit 110, p. 149, which is a copy from the *State Land Office* of Surveyor-General's list No. 1, Grand River district. This list contains township 18 north, 3 west, and includes the lands in question, and is *a copy of the same instrument put in evidence by the plaintiff* whose copy was taken from the *General* Land Office instead of the State Land Office.

See plaintiff's Exhibit 26, p. 36.

It will be observed that this Exhibit 110 is a copy of the original list retained in the Surveyor-General's office. It

is found in the State Land Office at Lansing, because the files and records of the Surveyor-General's office were turned over to the State Land Office.

On the face of this list, township 18 north, 3 west, *appears* to be erased, while on the copy put in evidence by the plaintiff (p. 36), the marginal note says: "This selection in town 18 appears to be superseded by supplemental list No. 3," and at the left at the head of the list appears the letter "F," and in the certificate attached to both copies it appears that the letter "F" indicates that such township has been fraudulently surveyed.

2d. Exhibit 161, p. 231, which is a certified copy from the records at Washington of the Surveyor-General's list No. 1, Grand River district, based on the original survey, in which by the marginal note it appears that the selections in town 18 *are superseded by supplemental list No. 3. This is a copy of the same instrument of which Plaintiff's Exhibit 26, p. 36, and Defendant's Exhibit 110, p. 149, are copies.*

3d. Exhibit 162, p. 234, which is a copy from the *General* Land Office of approved list No. 1, Ionia, and is *a copy of the same instrument of which Plaintiff's Exhibit 27, p. 37, and Defendant's Exhibit 111, p. 153, are copies.* It will be observed that Exhibit 111 is from the State Land Office, and the lands in 18-3 west, appear on the face of the Exhibit to be erased, while on Exhibit 162, the lands appear to be erased, and on the margin it says: "Selections in this township superseded by supplemental list No. 3." See p. 234.

In this manner it is shown that it appears by this Surveyor-General's list, under which the plaintiff claims that township 18-3, the town in question, was superseded by sup-

plemental list No. 3, and was treated as erased from the original list. There were other towns contained in the list which are omitted from the Exhibit in pursuance of the parties' stipulation. (Exhibit 1, pp. 15, 16.)

4th. Exhibit 111, p. 153, which is a copy from the State Land Office of *Approved* List No. 1, Ionia, dated October 27th, 1853, based upon said Exhibit 110, p. 149, made from the original survey.

This approved list is *a copy of the same instrument put in evidence by the plaintiff* (Plaintiff's Exhibit 27, p. 37), which latter exhibit is taken from the *General* Land Office, and is the approved list under which the plaintiff claims title.

By this Exhibit 111, p. 153, the lands in township 18 north 3 west, which includes the lands in question, *appear to be on the face of the exhibit, erased.* There are other towns included in said approved list (Exhibit 111), which for brevity are not included in the Exhibit put in evidence.

These Exhibits, 110 and 111, show that in respect to town 18 north, range 3 west, *the lists under which the plaintiff claims to recover were rejected and cancelled by the Surveyor General and by the Secretary of the Interior.* The plaintiff's Exhibit 26, p. 36, which is from the office of the Commissioner of the General Land Office, *shows the same fact by the marginal note.*

5th. Exhibit 112, p. 157, *which is a request from the Governor of the State of Michigan to the Commissioner of the Land Office, dated January 31, 1854, for a patent for the lands contained in approved list No. 1, Ionia, which is said Exhibit 111, from which the lands in town 18 north, range 3 west, are erased.*

6th. Exhibit 113, p. 157, which is a patent to the state, *dated March 17, 1857, issued in pursuance of said request of*

the Governor, of date January 31, 1854. It is to be observed in relation to this patent :

First. That it shows by its recital (p. 158), *that it is issued in pursuance of the foregoing request of the Governor, of date January 31, 1854.*

Second. *It conveys no lands in town 18 north, range 3 west.*

Third. *This patent was not issued until after the resurvey of town 18-3 west had been made.* This resurvey was made in 1856, as shown by the field notes of resurvey, which was Exhibit 114, pp. 159 to 168, see at page 168.

Fourth. It is manifest that the lands in town 18-3 west *were not patented,* because of the facts shown by this resurvey, and at the time the patent was issued and accepted by the state, the lands in 18-3 west, contained in said approved list No. 1, Ionia, (said Exhibit 111), were treated as not belonging in the approved list, *that township having been erased therefrom.*

7th. Exhibit 114, pp. 159 to 168, being the field notes of the resurvey of said township 18 north, range 3 west, which show the survey to have been made during the year 1856, and the return made December 26, 1856. (See p. 168.)

8th. Exhibit 124, p. 175. This is Surveyor-General's *Supplemental List* No. 3, Grand River District. *It includes township 18 north, 3 west.* The heading of this list says: "*This list being intended to supersede, or be in place of lists of swamp lands heretofore made of townships contained in it.*" It is dated May 13th, 1858. *This list does not contain the lands in question.* This means of course, that by the resurvey of the lands in that township, *these lands were found not to be swamp lands.*

9th. Exhibit 125, p. 177, a letter from the Surveyor-General to the Commissioner of the Land Office, forwarding among others, said Supplemental List No. 3, Grand River District.

10th. Exhibit 126, p. 178, which is the acknowledgement of the Commissioner of the Land Office of the receipt from the Surveyor-General of said *Supplemental List No. 3*, Grand River District, in which he says: "I have to acknowledge the receipt of your letter of the 12th inst., transmitting three lists of swamp land selections under the act of September 28th, 1850, to *supersede the lists of such lands heretofore reported to this office, made in the townships therein described*, viz: * * * Original Supplemental List No. 3, Grand River District."

11th. Exhibit 127, p. 178, which is a copy from the state Land Office at Lansing of *Approved List No. 10, Ionia*, containing the lands in 18 north, range 3 west, *contained in said Supplemental List No. 3*, Exhibit 124, p. 175. *Approved by the Secretary of the Interior, May 15th, 1866.*

12th. Exhibit 128, p. 180, which is a letter from the Commissioner of the General Land Office to the Governor of Michigan, dated May 26th, 1866, transmitting a copy of said *Approved List No. 10, Ionia*, (above Exhibit 127), in which he says: "You will please to acknowledge the receipt of said list, *and transmit your request for the patent to issue, on the receipt of which, or as soon thereafter as practicable, patent will be issued conveying the fee simple in said lands to the State.*"

13th. Exhibit 129, p. 180, is a letter from the Governor of Michigan to the Commissioner of the General Land Office

dated May 31st, 1866, acknowledging receipt of said copy of *Approved List No. 10 of swamp lands in Ionia district*, in which he says: "I also have the honor *to request that the patents for said lands may issue to the State of Michigan as soon as practicable, conveying the fee simple title thereof to said State.*"

It is to be observed that, by this action of the Governor, this Approved List No. 10, Ionia, which supersedes the Approved List No. 1, which is plaintiff's Exhibit 27, p. 37, upon *which plaintiff bases recovery, is recognized, assented to and acted upon by the Governor of the State of Michigan.*

14th. Exhibit 130, p. 181, is patent No. 20 to the state, dated June 21st, 1866, of the lands in said *Approved List No. 10, Ionia.* It purports upon its face (p. 182) to be issued on the request of the Governor of the state, of date May 31st, 1866, and conveys the lands in town 18 north, range 3 west, which are contained *in said Approved List No. 10, Ionia.*

15th. This Supplemental List No. 3, Grand River District, on which the above Approved List No. 10 (Ex. 127) was based, and on which said patent (Ex. 130) was issued, is further *recognized by the state authorities*, as appears in Exhibit 136, p. 189, which is a letter from the Commissioner of the State Land Office to the Commissioner of the General Land Office, dated April 30th, 1874, in which he says he transmits for examination "the annexed list of lands, *all of which are contained in Supplemental List No. 3* of swamp or overflowed land situated in the Grand River Land District, Michigan, meridian, in townships resurveyed. *Said entitled list was intended to supersede or be in place of lists made prior thereto of the townships contained therein.* The several descriptions sub-

mitted for examination have not been approved or patented to the state."

He therefore asks an approval of each of the parcels contained in the list with the view of patenting them. This letter expressly recognizes said Supplemental List No. 3 *as intended to supersede and be in place of lists* made prior thereto of the townships contained therein; that is, it is a recognition that said Supplemental List No. 3 *superseded the plaintiff's Exhibit 26, p. 36, and plaintiff's Exhibit 27, p. 37*, under which the plaintiff claims to recover.

The list inclosed in the letter appears on pages 190 to 193, and repeats the heading of the original of said Supplemental List No. 3, showing that it was intended to supersede or be in place of lists of lands theretofore made of townships contained in it, and specifies the parcels of land claimed by the letter to have been included in a list, but not approved or patented to the state, *among which are some lands in said town 18, 3 west.*

Exhibit 137, p. 193, is a reply to the above letter of the Commissioner of the State Land Office by the Commissioner of the General Land Office, explaining the situation in reference to lands in different townships contained in said list forwarded by the Commissioner of the State Land Office, and on p. 196, referring to lands in township 18 north, 3 west, says: "The following tracts are noted on our records as vacant. They will be embraced in a list at an early day, and submitted to the Hon. Secretary of the Interior for his approval."

Exhibit 138, p. 196, is a letter from the Commissioner of the State Land Office to the Commissioner of the General

Land Office, dated August 12th, 1875. Referring to the above Exhibit 137, p. 193, and to the lands stated in that Exhibit to be vacant, and the statement that they would be submitted at an early day for approval, he says (p. 196): "We respectfully request that the lands be embraced in a list and submitted for approval without further delay, if consistent with your views."

Exhibit 139, p. 197, is a reply to the above letter, (Ex. 138, p. 196) by the Commissioner of the General Land Office, saying that certain of the lands referred to by the Commissioner of the State Land Office, and among them descriptions in 18, 3 west, "were embraced in list No. 20 of swamp and overflowed lands for the Ionia district, Michigan, and the following tracts, to-wit, (being a portion of the lands referred to) were embraced in list No. 21 of swamp and overflowed land for the Ionia, now Traverse City, district, Michigan, which lists were on the 10th inst. submitted to the Secretary of the Interior for his approval, preliminary to patenting the lands embraced therein to the State of Michigan under the swamp grant."

Exhibit 140, p. 198, is a copy of Approved List No. 20, Ionia, referred to in said Exhibit 130, p. 197, and contains the lands in town 18-3 west, referred to in the foregoing correspondence. The approval is dated September 10th, 1875.

Exhibit 141, p. 199, is patent No. 34 to the state, of said lands in town 18-3 west, contained in said Approved List No. 20, and the patent shows *that it is issued at the request of the Governor of the State of Michigan.*

10th. Exhibit 142, p. 200, is a certificate of the Commissioner of the State Land Office, dated June 16, 1892, showing that "no swamp lands in township 18 north, range 3 west, under Act of Congress approved September 28th, 1850, are included in an approved list on file in this office, except Approved List No. 1, Ionia, Approved List No. 10, Ionia, and Approved List No. 20, Ionia, nor in any patent except patents Nos. 20 and 34, Ionia District.

The above evidence shows that after the Surveyor-General's list, Exhibit 26, p. 36, and approved list Exhibit 27, p. 37, under which the plaintiff claims had been made, and after a request for patent of lands in this approved list, but before any patent issued a resurvey of town 18-3 was made, and after such resurvey this town was erased from those lists, upon the ground that the original survey was found to be fraudulent. A patent was then issued to the state, conveying lands in this approved list *other than lands in town 18-3, and conveying no lands in that town.* A new list was made by the Surveyor-General, upon the resurvey of the lands in this town, which list did not include the lands in question. This list was expressly intended to supersede and take the place of the list under which the plaintiff claims, which fact appears upon the face of the list. This list is transmitted to the Commissioner of the State Land Office at Lansing, who ackonwledges it as a list intended to supersede the former list. Based upon this list, a list of lands in town 18-3 is approved by the Secretary of the Interior and forwarded to the Commissioner of the State Land Office at Lansing. The Governor of Michigan *requests patent to issue, in pursuance of this list*, and patent was issued to the State in accordance with that request. The patent conveyed the lands in town 18-3, according to the evidence of the resurvey. It did not include the lands in question.

These facts distinctly appear, viz: The land department of the government intended to act finally and did act finally in identifying the lands in town 18-3 upon the resurvey, it intended that the list made upon the resurvey should supersede the list made upon the original survey, and did not intend that both lists should be of force in respect of this town; the Governor and authorities of the state were informed of these facts, and acting upon such information, the Governor requested a patent to be issued, conveying the lands in accordance with the list based upon the resurvey, and a patent was issued accordingly.

The Governor knew, when he made the request for patent, that the state was not entitled to lands in this town upon both the original list and upon the list which was made to supersede such original list, and he made his election in behalf of the state to take the lands according to the list, which the Secretary of the Interior approved as the final and correct identification of the lands. This latter list was repeatedly acted upon by the state authorities and the Governor as the "one true" list, requesting subsequent conveyances to be made in accordance with the list, which requests were complied with.

FIFTH.

THE DEFENDANT PUT IN EVIDENCE, THAT IT WAS THE PRACTICE OF THE UNITED STATES AUTHORITIES, WHEN MAKING SELECTIONS OF ANY LANDS IN A TOWNSHIP TO MAKE THE SELECTIONS OF THE ENTIRE OF THE SWAMP LANDS IN THE TOWNSHIP AS FOLLOWS:

Exhibit 97, p. 136, which is the report of the Commissioner of the General Land Office for the year 1852, in which,

under date of November 2d, 1852, replying to a request for the approval of lands in advance of the regular list, he says: "Frequent applications from other states, having heretofore been made of a similar nature, it was found necessary *to establish a rule not to act upon any isolated tracts without taking action upon the whole selections from any one district*, for the reason that the final adjustment of the grant would thereby be much retarded."

SIXTH.

THE DEFENDANT PUT IN THE FOLLOWING EVIDENCE SHOWING THAT THE STATE RECOGNIZED THE ~~fe~~ SURVEYS MADE IN OTHER TOWNSHIPS, AND THE LISTS MADE UPON THEM, AS SUPERSEDING THE LISTS MADE AND APPROVED BASED UPON THE ORIGINAL AND FRAUDULENT SURVEYS.

1st. Exhibit 119, p. 171, which is a letter from the Commissioner of the General Land Office to the Governor of Michigan, dated February 24th, 1855, in which he says: "The Surveyor-General of Michigan has transmitted to this office a list of swamp and overflowed lands in the Cheboygan District, Michigan, in townships resurveyed and platted, *which list abrogates and supersedes all lists of swamp lands heretofore made of the townships contained within it.*"

Then after giving a list of nineteen townships, he says: "The original selections in the foregoing townships made from the defective plats *were approved in lists numbers 1, 2 and 3, Ionia District, Michigan, certified copies whereof were transmitted to your predecessor January 13th, 16th and 18th, 1854.* IN CONSEQUENCE OF THE ALTERATION NECESSARY, BY REASON OF THE LIST RECENTLY RECEIVED, I HAVE THE HONOR TO REQUEST A SUSPENSION OF ALL ACTION UPON THE LISTS

HERETOFORE FURNISHED YOU, SO FAR AS THESE SEVERAL TOWNSHIPS ARE CONCERNED, UNTIL THE DIFFERENCES CAN BE ASCERTAINED AND ADJUSTED."

2d. Exhibit 120, p. 172 to p. 173, is an extract of the report of the Commissioner of the State Land Office of Michigan to the Legislature, for the year 1855, which report says (p. 172): "This office was notified in February last by letter from the Commissioner of the General Land Office of the resurvey by the general government of considerable tracts of land embraced in the lists of swamp lands, including several townships in the northern part of the state, situated principally in the Ionia Land District, *and the same have been, as directed, marked as suspended on our books.*"

The report shows that such action was taken by the Governor in response to said letter of February 24th, 1855, by the Commissioner of the General Land Office to him (Ex. 119, p. 171) as was suggested in that letter, viz: The list based upon the resurveys was recognized as abrogating and superseding the former lists, which former lists were accordingly marked as suspended on the state books.

3d. Exhibit 118, p. 170, is an extract from the report of the Commissioner of the State Land Office for the year 1856, which, after referring to the report last above referred to, says: "Patents are now received for all these lands in the state, except those situate in the Ionia Land District, comprising about 1,200,000 acres, and for these we are assured the patents will soon be forwarded, the making of which have been delayed *in consequence of extensive resurveys by the general government, which in some instances changes the amount and character of the land.*"

Then speaking of the application for the purchase of par-

ticular descriptions, and that no valid sale could be made until after compliance with the law requiring advertisement of a public offering to be published, the report says: "And such public sale or offering has not been deemed advisable until after the title of the state to the grant should be wholly confirmed *by the issue of the patents*, and the numerous corrections and restatements of the lists necessary to be previously made by the department at Washington."

SEVENTH.

THE DEFENDANT PUT IN THE FOLLOWING EVIDENCE SHOWING THAT THE STATE MADE NO CLAIM TO LANDS CONTAINED IN THE LISTS BASED UPON THE ORIGINAL SURVEY IN TOWNSHIP 18 NORTH, RANGE 3 WEST, WHICH HAD BEEN SUPERSEDED BY THE LISTS ABOVE REFERRED TO, BASED UPON THE RESURVEY. SUCH LANDS BEING DISPOSED OF BY THE UNITED STATES AT PUBLIC AUCTION, AND NO CLAIM OR PROTEST WAS MADE ON THE PART OF THE STATE.

1st. Exhibit 151, pp. 209 to 211, and Exhibit 151 A, pp. 211, to 213. By these exhibits it appears that Brewer and Burt and others, made entries at the United States Land Office in 1867 for certain lands, amounting to 13,454 acres, in township 18 north, 3 west, 19 north, 3 west, and 20 north, 3 west, which were included in the original list of swamp lands made upon the original survey. By the resurvey in these townships, it appeared that these lands were not swamp, and, therefore, the swamp selections which had been made, including these lands, were set aside upon the filing of the lists upon the resurvey, from which latter lists these lands were omitted. (p. 209.)

The lands were afterwards claimed by the Flint & Pere Marquette Railroad Company as belonging to that company under the railroad grant to the State of Michigan, of June 3rd, 1856. (p. 209.)

It was held by the United States authorities that the effect of the selection of the lands in the original lists in 1852 as swamp lands, was to withdraw them from market, and that they were not afterwards restored to market when the lists based upon the resurveys were substituted in their places, and that their restoration to market required a public notice to be given of their sale. The entry of the lands by Brewer, Burt and others, was cancelled. (p. 211.)

This decision of the Commissioner of the General Land Office was affirmed, and the lands in question were directed to be offered for sale by the Register and Receiver, at Ionia, Michigan, to the highest bidder, at a time and place to be fixed, of which public sale notice was to be given.

See Exhibit 151-A, p. 212.

2d. Testimony of William L. Webber, pp. 239, 240 and 242.

This testimony shows that a public sale of the lands was made by the United States at the U. S. Land Office at Ionia, including lands in township 18-3 west, and 19-3 west.

Mr. Webber attended the sale in behalf of the Flint & Pere Marquette Railroad Company, but there was no notice given in behalf of the state, of any claim to the lands, nor any protest made against the sale on the part of the state, although it was a sale which attracted much attention.

3d. Exhibit 157, p. 221, which is a letter, dated April 5th, 1859, from the Commissioner of the State Land Office to the Governor of the state, in which lists of lands were furnished

to the Governor, showing the difference in the amount of swamp lands, as found by the original surveys, and the resurveys. He says: "The difference in the lands now patented to the state, *between the old and new survey, amounts* to 235,000 A, and I judge by this communication that the department at Washington do not propose to change that list."

4th. Exhibit 160, p. 226, which is from the report of the Commissioner of the State Land Office of Michigan for the year 1860. This report gives information on the subject of the swamp lands and says 5,857,462.05 acres have been approved to the state, of which 5,049,125.44 acres have been patented, leaving unpatented and unadjusted 808,336.61 acres. This statement has been made *from the approved lists and patents*, and is believed to be very nearly correct. (Page 236.)

On page 227, the report says: "We gather from the correspondence on file in this office between the state authorities and the department at Washington *that the general government proposes to adopt throughout the resurvey as the basis of patents.*"

After further showing complications which have arisen in adjusting the grant between the United States and the state, the report says (p. 227): "The peculiar circumstances of the conflictions which have arisen, must be settled, and a basis adopted by personal communication between constituted authorities on the part of the state and United States governments."

March 11th, 1861, the Legislature of the State of Michigan, passed act number 123, Session Laws of 1861, p. 167, authorizing the Commissioner of the State Land Office "to cause lands sufficient to supply the existing deficiency in the quantity accruing to this state, by virtue of the Act of Congress, approved May 20th, 1826, the ordinance of admission,

July 25th, 1836, and any other land grant since made to this state by Act of Congress, to be selected and located in parcels in conformity with the provisions of the several acts making the same."

It will be seen that this statute authorizes the Commissioner to act in reference not only to the swamp land grant, but to all the grants of lands which had been made to the state.

5th. Exhibit 158, p. 222. This is a report of the Committee of Public Lands, of the Legislature of Michigan to the Legislature in the year 1861, upon the subject of the swamp lands granted to the state. The report says, p. 223: "In order to give the house a better understanding of the whole matter, the committee have procured and herewith present a statistical table (marked B) whereby it will be seen that the *whole amount granted to the state is 5,890,361 acres, of which the state has received patents for 5,082,375, leaving unpatented 807,985 acres.* Amount disposed of 429,489 acres, showing the amount unsold to be 5,460,871 acres. Included in the amount disposed of, is the amount licensed, 75,422 acres.

By reference to the statistical table herewith annexed, the amount in each county will be easily ascertained."

The statistical table referred to and annexed to this report, p. 224, gives by counties the amount of swamp lands in each county, the amount patented, and the amount unpatented in each county. It states as follows in respect of Clare county, which is the county in which the lands in question are situated, viz:

"Clare—Amount of swamp land in 93,720.56. Amount patented, 59,950.08 Amount not patented, 33,770.48."

6th. Exhibit 159, p. 225, accompanied by statement B, p. 224. This Exhibit 159 is a letter from the Commissioner of the State Land Office, dated July 10th, 1861, to the Commissioner of the General Land Office, inclosing said statement B, as showing the condition of swamp lands in the State of Michigan, in which he says: "The amount selected according to the rule adopted by the Land Office Department, and remaining unpatented, is shown by counties in the third column of the tabular statement, and it is to this particular class of land, denominated in this office unpatented, to which I desire to call the attention of the Commissioner of the General Land Office.

When probably, in the usual routine of your office, may we expect patents for the balance accruing to the State of Michigan?"

It will be observed that this is a recognition on the part of the state of the selections of swamp lands accruing to the state, as the selections had been made and were held to be on the part of the United States, and a request for the balance of the lands so selected, to be patented to the state. It shows the balance to be 807,995.55 acres.

7th. The report of the Commissioner of the State Land Office, for the year 1862 (p. 228) which reports his proceedings under said law of 1861, and says that he had "met a prompt response from the present Commissioner of the General Land Office, and that we have received patents for 362,463.28 acres, and that in the communication heretofore referred to, the Commissioner informs me that 'we have also prepared patent No. 15, containing 93,691.25 acres and patent No. 16, containing 72,585.49 acres, making a total of 533,730.02 acres since last report.' This is in the Ionia and Traverse City land districts.

It is confidently believed that all the questions in relation to our land grants, heretofore unsettled, between the general government and this state, are in progress of a speedy and satisfactory adjustment."

8th. The report of the Commissioner of the State Land Office for the year 1865 (p.228), showing that under the proceedings taken under said act of 1861, his predecessor had forwarded to the Commissioner of the General Land Office, a carefully prepared list of all deficiencies as a basis by which the state could select the balance due. He says this statement was acted upon by the Commissioner, "and transmitted to this office where it was again compared and found to disagree in some material points from the plats and records in this office, and it was again forwarded to the General Land Office for comparison and correction, and has not yet been returned to this office. Hence no selections, on account of the deficiencies, have as yet been made."

9th. Report of the Commissioner of the State Land Office for the year 1866 (p.229) in which he says: "We have received approved lists of about 231,000 acres of the swamp lands which were omitted in former lists on account of the difficulty of making the selections, by reason of the changes *made between the old or fraudulent surveys in some sections of the state, and the resurveys.* When patents are received for the lands embraced in such lists, the lands can be speedily brought into market."

Here is a distinct recognition that the resurveys are to govern, and that the adjustment of the land grant between the United States land department and the state, is made upon the basis of the resurveys.

10th. Report of the Commissioner of the State Land Office for the year 1868 (p. 229) in which he says: "*The entire amount of swamp lands conveyed to the state by the Act of Congress have been patented, with the exception of about 40,000 acres, lying in Cheboygan and Houghton Counties.* And all, excepting about 100,000 acres, have been placed in market."

11th. The report of the Commissioner of the General Land Office for the year 1869 (p. 229). This report says: "The greater portion of the swamp lands have heretofore been placed in market. There is still remaining, however, about 100,000 acres unoffered. A public sale is now pending, to take place on the 6th day of January next, at which time it is expected to place in market the entire body of swamp lands for which the state has recived patents. THE AMOUNT REMAINING UNPATENTED IS ABOUT 35,000 ACRES, LYING IN THE COUNTY OF CHEBOYGAN, AND IS EMBRACED IN AN INDIAN RESERVATION, AND CANNOT BE REACHED UNTIL SAID RESERVATION IS EXTINGUISHED."

This shows that all the swamp lands claimed by the state, at the date of this report, had been patented to the state, except the above 35,000 acres in Cheboygan county.

These two reports of 1868 and 1869, are an admission that the state had received all the lands to which it was entitled under the grant, except certain lands lying in Cheboygan county, which lands could not be reached *becaus. of an Indian reservation.* These reports show also that all the swamp lands belonging to the state, situated in Clare county, as shown by said Exhibit 158, p. 222, 224, had been patented to the state. These reports also show the assent of the state to the identification and patenting of the lands by the Secretary of the Interior on the basis of the resurveys.

12th. The report of the Commissioner of the State Land Office for the year 1870, (p 230) which shows that it was deemed "of great importance that a full and reliable statement of the amount and condition of these lands (swamp lands) should be placed before the Legislature," and that such statement has been prepared "at great labor and with the utmost regard for accuracy."

The report says that it will appear at the close of his report in tabular form, and from which it will be shown that the total amount of swamp land, passed to the state under the act of Congress of 1850, was *5,794,308.57* acres, that of this amount 3,160,516.21 acres were in the Lower Peninsula and *2,633,792.36* acres were in the Upper Peninsula. To the amount in the Lower Peninsula, as above given, should be added 18,823.93 acres, conveyed by the general government to replace the lands sold and commonly known as "Green Lands."

The report says that much of the complication, in regard to the swamp land grant, arose from sales made by the general government after the passage of the swamp land grant of September 28th, 1850. These lands were designated as "Green Lands."

13th. The report of the Commissioner of the State Land Office for 1874 (p. 230), which states that "Under the Congressional grant of September 28th, 1850, the state has received patents for *5,838,616* acres of swamp land, so called. Large quantities have, however, proved very valuable for lumbering and agricultural purposes. There remains yet to be patented to the state several thousand acres. We have secured the approval of 19,863 acres during the fiscal period, which will be carried into patents during the ensuing year."

It will be observed that these reports for 1870 and 1874 show that there had been patented to the state *more swamp*

lands than was claimed belonged to the state under the swamp land grant, as shown by the statement prepared, at great labor and with the utmost regard for accuracy, and laid before the Legislature, according to the report of the Commissioner of the Land Office, for the year 1870, p. 230, above referred to.

In all this evidence it appears that the state assented to the action which had been taken by the United States authorities, based upon the resurveys which had been made in the townships where those authorities had found the original survey to be fraudulent, and had designated the lands accruing to the state under the grant on the basis of the resurveys.

EIGHTH.

THE FOLLOWING EVIDENCE WAS PUT IN BY THE DEFENDANT, SHOWING THE PRACTICE OF THE UNITED STATES AUTHORITIES TO MAKE CORRECTIONS IN APPROVED LISTS OF SWAMP LANDS FORWARDED TO THE STATE, WHENEVER IT WAS FOUND, AFTER SUCH LISTS HAD BEEN FURNISHED, THAT CORRECTIONS OUGHT TO BE MADE FROM EVIDENCES AFTERWARDS COMING TO THE KNOWLEDGE OF THE GENERAL LAND OFFICE.

See
Exhibit 87, p. 129.
" 88, p. 129.
" 89, p. 131.
" 98, p. 136.
" 99, p. 137.
" 100, p. 137.

Exhibit 102, p. 139.
" 103, p. 140.
" 104, p. 142.
" 105, p. 143.
" 106, p. 145.
" 107, p. 146.
" 108, p. 148.
" 109, p. 148.

NINTH.

The patent under which the lands in question were conveyed by the State of Michigan to Edward W. Sparrow, plaintiff's Ex. 34, p. 54, shows that the lands were obtained under Act No. 30 of the Session Laws of 1883.

This act is found in the Public Acts of 1883, p. 133.

The act appropriates for the purpose of improving the channel of the Cedar River, 10,000 acres of swamp lands in the Lower Peninsula, not otherwise appropriated. It authorized the work to be done by a contractor, who must select the lands to be withheld to be applied upon his contract.

The act does not specify any lands nor provide any other manner for identifying or specifying particular lands than the selection to be made by the contractor.

The evidence of Mr. Sparrow (p. 238) shows that he was a contractor under said act, and that he himself selected the lands which he claims, and that he procured the issue of the patents therefor.

TENTH.

The defendant's evidence shows that the defendant bought the lands under the title derived from the government of the United States, in good faith, and paid a large and valuable consideration therefor, without any knowledge of any adverse claim by the State of Michigan, or any other person, to the lands.

Chas. A. Rust, pp. 240, 241.

The plaintiff's evidence shows that the lands were purchased of the United States, and patents issued therefor in 1870, and were afterwards conveyed to the defendant (pp. 59 to 63, Exhibits 37 to 52 on the above pages.)

All the evidence in the case was returned (p. 286) and a verdict was directed for the defendant by the Court.

(Page 289.)

Assignments of error are made by the plaintiff to the admission of the defendant's evidence, and to the charge of the Court directing a verdict.

If the facts constituting the defence are proper to be considered, we do not understand that it is claimed by the plaintiff that the evidence offered to establish the facts was not proper evidence.

Upon the evidence as given, the facts were not in dispute, and a direction of the verdict was proper if the facts stated a defence.

The questions presented are:

1st. The right of the Secretary of the Interior, before a patent was issued for the lands, to set aside the list of selections of swamp lands made upon the field notes of the original

survey, upon the ground that the original survey was found by a resurvey subsequently made, to be fraudulent and false, and in the place of such lists make a list of selections of swamp lands from the field notes of the resurvey, making the resurvey and the lists made thereon supersede and take the place of the original survey and the lists made therefrom.

2d. The effect of the act of March 3d, 1857, upon the original list of swamp lands, which was based upon the field notes of the original fraudulent survey.

3d. The effect of the acts of the authorities of the state in assenting to and accepting the new lists, made from the field notes of the resurvey and asking for and accepting patents of the lands selected upon the field notes of the resurvey, and in recognizing the acts of the Secretary of the Interior in making selections from the field notes of the resurvey and placing such selections in the place of the selections which had been made from the field notes of the old survey, and making no protest or objection to the sale by the United States of the lands which were included in the old lists and which were not included in the superseding or new lists.

I.

The right of the Secretary of the Interior to correct the list of lands made upon the original survey, prior to the issue of any patent in pursuance of such list, by making and approving a list to supersede such list, basing his action upon a resurvey which was made because the original survey was fraudulent.

The plaintiff bases its right to recover upon Surveyor-General's List No. 1, Grand River District, Exhibit 26, p. 36, dated March 29th, 1852, and Approved List No. 4, Exhibit 27, p. 37, dated October 27th, 1853, which lists include the lands in question. The defendant claims that these lists were superseded by Surveyor-General's Supplemental List No. 3, Grand River District, Exhibit 124, p. 175, dated May 13th, 1859, and Approved List No. 10, Ionia District, Exhibit 127, p. 178, dated May 15th, 1866, approved May 18th, 1866, which lists exclude the lands in question.

It is submitted that the Secretary of the Interior had the right, before the issue of the patent for the lands contained in the list made from the original survey, to correct and supersede such list by substituting in its place the list based upon the resurvey.

The resurvey was made by the land department, under appropriations made by Congress, for the purpose of correcting the original survey.

First. The identification of the lands which were included in the grant.

The terms of the grant provided: "That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the Governor, and at the request of said Governor, cause a patent to be issued to the state therefor; *and on that patent the fee simple to said lands shall vest in said state.*"

The act further provides: "That in making out a list and plats of the lands aforesaid, all legal subdivisions, the greater part of which is 'wet and unfit for cultivation,' shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom."

9 U. S. Stat., 519, Secs. 2 and 3.

No other guide for the action of the Secretary of the Interior in making the identification of the lands is furnished than the above provisions.

Second. The method of identification of the lands being left to the Secretary of the Interior, he could adopt such means of obtaining evidence which would show what lands came within the description of the grant, as seemed to him proper for that purpose.

He adopted the plan stated in the plaintiff's Exhibit 3 A, p. 16, being the letter of instructions of the Commissioner of the General Land Office, of date November 21st, 1850.

1 Lester's Land Laws, p. 543.

This letter requires the Surveyor-General to make out a list of all the lands granted to the state by the Act, and designates two modes of procedure by which the Surveyor-General is to make the selection of the lands, the one of the two modes to be adopted by him to be decided by the election of the authorities of the state in which the lands lie.

The instructions say (p. 18): "The only reliable data in your possession from which these lists can be made out, are the field notes of the surveys on file in your office; and if the authorities of the state are willing to adopt these as a

basis of those lists, you will so regard them, if not, and these authorities furnish you satisfactory evidence that any lands are of the character embraced by the grant, you will so report them."

The effect of these instructions was this: If the state authorities elected to adopt the field notes of the surveys in the Surveyor-General's Office, then the United States Land Department, without expense to the state, would make the selections of swamp lands, and there would be nothing for the state authorities to do but to accept such selections when made, and request and receive the patents for the lands selected.

In case the state authorities should not adopt the field notes as a basis of the selections, then the state would be required itself, at its own expense, to furnish satisfactory evidence to the United States Land Department of the lands which it claimed came within the description of the grant.

The advantage to the state in adopting the field notes was the saving to it the expense and labor of furnishing such evidence to the Land Department.

The State of Michigan elected to "adopt the notes of the surveys on file in the Surveyor-General's office."

Session Laws of Mich. of 1851, p. 322.

The language of this Act is: "The people of the State of Michigan enact that they adopt the notes of the surveys on file in the Surveyor-General's office, as the basis upon which they will receive the swamp lands granted to the state by an Act of Congress, of September 28, 1850."

The field notes thus referred to by the United States Land Department and by the State of Michigan are *not limited to the field notes at that time on file in the office of the Surveyor-General.*

1st. The language employed does not so limit them.

2d. The intention is to make use of the field notes of the survey which is recognized as the *official survey*, the survey which is acted upon by the United States in the sale and disposition of the public lands.

The original of such surveys are made from time to time by the land department, and resurveys are also made from time to time to correct the frauds and mistakes which occurred in the making of the first surveys.

At the time this action was taken by the state, the original surveys had not been completed in the State of Michigan.

See record at page 103, Ex. 77, Surveyor-General's report, dated March 5th, 1851.

The resurveys had been begun in Michigan by the express request of the Legislature of the state, which stated that "it has been satisfactorily made to appear to this Legislature *that large districts of lands* lying within the limits of the State of Michigan have been returned by some of the Deputy United States surveyors, to the General Land Office, as surveyed, where no surveys whatever have been made, or where the surveys have been so imperfectly done as to be utterly valueless."

It further recited the fact that the "United States Surveyor-General of this land district has caused the lands so

represented as surveyed *to be offered for sale* to the very great injury to the State of Michigan and the citizens thereof."

This statement of fact was followed by a request to the President of the United States to cause to be surveyed eighty-one described townships.

Exhibit 57, p. 64.

The only course to be taken by the government for such correction, was to send its surveyors to the townships and by examination on the ground ascertain whether the surveys had in fact been made, as they appeared by the returns on file in the Surveyor-General's office.

The inquiry thus instituted, by the express request of the Legislature of the state, disclosd not only that the fraud alleged by the Legislature existed, in reference to the surveys of the particular townships mentioned by the Legislature, but also that such fraud existed in a large number of other townships.

There was the same need for correction in all the townships in which such fraudulent surveys were found to exist in order to protect both the interests of the United States and of the state, from the injuries arising from such fraudulent surveys.

The character of the injuries done by these fraudulent surveys, in addition to the statement contained in the resolution of the Legislature of the state, are expressed in the letter of Senator Woodbridge, September 16th, 1844, to the Commissioner of the General Land Office (Ex. 67, pp. 80, 81, 82), where he says, p. 80, that it was his view "that the surveys in Michigan would be forthwith re-commenced and at least that all these erroneous surveys, which have been made the

subject of so much complaint here, and which were and are leading to such interminable mischief, would have been immediately attended to."

He further says, speaking of the purchase of the public lands (p. 81): "Others who would buy are deterred from purchasing because of the fear that is entertained that whosoever buys there, buys for himself and his assigns forever, interminable law suits instead of a good title, by reason of that outrageous fraud in the surveys."

Further speaking of these false returns of surveys, he says (p. 82): "They are of incalculable extent, and have already produced a deep feeling of wrong done throughout our state."

The Commissioner of the General Land Office, in his report for the year 1851 (Ex. 78, p. 105), speaking of the injury done to the United States, says (p. 106): "The injury to the government, in consequence of the frauds committed in the surveys in this state, consists not only in the pecuniary loss on account of the surveys, but in the false reports of the character of the country, some of the finest portions of which, being represented in the original surveys as indifferent, second and third rate land, and sometimes swamp, *have been rendered unsalable for many years.*"

The resurveys, to remedy these injuries, were begun in 1842, and were being carried on at the time of the adoption of the Act of September 28th, 1850, and were continued thereafter down to 1857 *with the assent and acquiescense of the state.*

The following appropriations were made by Congress for the purpose of making such resurveys, "to correct erroneous and defective surveys," viz:

In 1845, ten thousand dollars.

5 U. S. Stat., 762.

In 1846, five thousand eight hundred and eighty dollars.

9 U. S. Stat., 95.

In 1849, ten thousand dollars.

9 U. S. Stat., 365.

In 1850, twenty thousand dollars.

By Act of September 30th, which was *two days after the adoption of the swamp land grant of September 28th, 1850.*

9 U. S. Stat., p. 530.

In 1851, ten thousand five hundred dollars.

9 U. S. Stat., 611, 612.

In 1853, the two sums of five thousand dollars and three thousand dollars.

10 U. S. Stat., 204.

In 1854, twenty thousand one hundred and sixty dollars.

10 U. S. Stat., 565.

In 1855, ten thousand eight hundred dollars.

10 U. S. Stat., 660.

In 1856, nine thousand seven hundred fifty dollars.

11 U. S. Stat., 86.

3d. The field notes referred to by the act of the Legislature of Michigan, were not made for the purpose of identifying the lands under the swamp land grant of September 28th, 1850.

They were incidental to and a part of the *official surveys* made by the government for the purpose of the sale and disposition of the public lands.

1 U. S. Stat., p. 466.
U. S. R. S., Sec. 2395, Sub. D. 7.
Heath vs. Wallace, 138 U. S., at p. 583.

4th. It was not practicable that there should be two surveys recognized as in force, respecting the lands in the same town, one for the sale and disposition of the public lands, and the other for the purpose of selecting the swamp lands in the town, *because the subdivisions and parcels of land by one survey would differ from the subdivisions and parcels of the same section in the other survey.*

The lines and boundaries and corners of the two surveys would be different and conflicting.

In order, therefore, to have limited the selections of swamp lands to the field notes *then* on file in the Surveyor-General's office, *it would have required the general government to abandon the resurveys and corrections of the original surveys*, and would have required it to treat the public lands as surveyed, even in those cases where no surveys had been made and no lines had been run, as was alleged by the Legislature of the State of Michigan.

It is clear that no such intention existed on the part of the United States or of the state. It is not to be supposed that the state desired to adhere to the field notes on file in order that it might profit by any *fraudulent*, *false* or *fictitious surveys*, and get more lands thereby under this gratuitous grant.

In Dale vs. Turner, 34 Mich., 405, the Supreme Court of Michigan had occasion to deal with questions arising under

this swamp land grant, relating to sales which had been made by the United States after the passage of the act, and used the following language expressive of the intent of the state in its dealings with the United States under the grant. (p. 410), viz :

"Seeing that the purpose of Congress was to make a donation, and not a conveyance for consideration, and believing that the act did not of its own force immediately transfer the lands in absolute property to the state, and naturally wishing to act *in the same spirit of liberality which had actuated the general government*, the Legislature were of the opinion that measures should be taken to protect the rights of intervening purchasers from the United States, and enable the state and the United States to settle in an amicable, fair and practical way, as between themselves, in all cases where the rights of such purchasers might be involved. The very nature of the subject and all the circumstances were adapted to incline the Legislature to *act on broad views of right and policy, and to abstain from all extreme pretensions and all attempts to gain technical advantage. In its origin and development, the matter was not one of negotiation and diplomacy, nor one stimulated or directed by national or personal greed. The occasion was not one of higgling between eager and exacting adversaries. It was an affair between governments of the same system, intimately connected by ties of interest and of friendship. The lands were to be a gift.*"

To impute to the state the intention to adhere to the field notes on file as they existed at the time the grant was made because it would thereby obtain more lands under the grant and would get profit by the fraudulent surveys, *is to impute dishonor to the State.*

5th. If it was the intention on the part of the state to limit the selections of the swamp lands by the Land Department

to the field notes then on file, why did not the state notify the United States authorities, after the grant had been made, to discontinue the surveys which had been commenced at its request, and which would continue under appropriations from year to year made by Congress with the knowledge of the state, or at least notify the department that it would not accept the field notes of the resurveys made after the date of the grant? It not only took no such action, but on the contrary with the knowledge of such appropriations, and of the resurveys, *and that the resurveys were made to supersede the original and fraudulent surveys*, accepted the selections made upon the field notes of the resurveys, and requested and received and accepted patents for the lands selected upon those field notes.

It is an inevitable conclusion that it was the intention both on the part of the United States and of the state, that the field notes to be used in making the selections were the field notes of the *final, official survey* of the public lands made by the United States, on which surveys the United States would act in making sale of the public lands.

This is the construction by the Secretary of the Interior in reference to the field notes.

State of Mich., 7 Decision Dept. Interior, 514 at 517, 518, 522.

In this case, the Secretary of the Interior, speaking upon this direct subject, says: "Finally, so far as this case is concerned, the obligation of the supposed understanding turns upon the application to be given to the terms employed, the notes of the surveys; for if this phrase means the notes of the corrected and permanent surveys, which was its interpretation from the beginning to the end of the certifications made to Michigan, as already shown by the facts narrated, the force of the claim is turned against the state.

The value of contemporary construction is universally acknowledged; and in this case, irrespective of any question of estoppel, the action of the department and its acceptance by the state during so many years, can leave little doubt *that the field notes referred to were intended to be those which furnished the best evidence of the fact.* The force of this contemporaneous construction is augmented by the fact that at the time when the phrase was first employed, in the adjustment of the grant with the State of Michigan, many resurveys had already been made, some of them at the request of the state itself, and that others were in progress under specific appropriation thereof by Congress; appropriations which were in terms, 'for correction of erroneous and defective surveys, for resurveying and correcting erroneous surveys, and the like.

It cannot be presumed that when corrected surveys already existed, or were in progress, reference by this phrase was intended to those which were, or should prove to be erroneous and defective, instead of those which were correct and reliable. If, therefore, the meaning of the phrase, as applied to surveys already made or in progress, attached to the notes of corrected surveys, instead of the original defective ones, it cannot be doubted that it clearly applied to the notes of such surveys as should be subsequently, by authority of Congress, likewise corrected, and since this obvious conclusion was, in fact, recognized and acted upon by both parties when the resurveys were afterwards made, the meaning of the phrase in the supposed agreement must be accepted accordingly."

This being the case, the identification of the lands was not in any case completed until the final adoption by the United States, of the field notes which became the field notes of its final and official survey, and, therefore, the Secretary of the

Interior had the right, down to the time when such final field notes were made, to treat the identification as incomplete, and to correct such lists as had been made upon the old and fraudulent field notes.

Third. The following are decisions of the Secretary of the Interior, holding that lists of lands which have been certified as coming within the grant may, before patent issues, be superseded by the Secretary, on the ground that the evidence upon which they were based was false and fraudulent, and also upon the ground of a mistake.

State of Oregon, 5 Decisions Dept. Interior, p. 31.
State of Oregon, 5 Id., p. 300.
State of Oregon, 5 Id., p. 374.
State of Oregon, 7 Id., p. 572.
State of Minnesota, 6 Id., 637.
State of Wisconsin vs. Wolf, 8 Id., p. 555.
Lachance vs. Minnesota, 4 Decision Dept. Interior, 479, 481, 482.
State of Minnesota vs. Spence, 8 Decision Dept. Interior, 64.
State of Florida, 12 Decision Dept. Interior, 565.
State of Michigan, 7 Decisions, 514, 515.

In the case of the State of Oregon, 5 Decisions of Dept. Interior, page 31, the process of determining what lands were swamp within the grant, by arrangement between the land department and State of Oregon, was an examination by Commissioners, and upon a report made upon such examination, a list of lands was certified to the state, known as List No. 5. After this list had been so certified, a claim was made to a portion of the lands, asserting that they were not swamp lands, but were lands belonging to the United States which its citizens had a right to enter.

The question presented to the Secretary of the Interior

was whether the list so certified might be impeached for fraud.

Secretary Lamar held that such approval and certification of the list, affirmatively determined the fact that the lands were within the grant and that (pp. 33 and 34) "such judgment cannot be drawn in question, or subject to a different adjudication, by merely showing that the Secretary committed an error in his finding."

"Such approval and certification, however, will not conclude the government if it be shown that it was obtained by fraud or mistake. If, after such approval and certification of the list, it is discovered that lands have been reported as swamp and overflowed, which in fact were not of that character, and that such lands were so reported through the false and fraudulent acts and misrepresentations of either the government agents or others charged with the investigation of the character of such lands, and upon whose decision and report the approval and certification was obtained, such approval and certification may, upon proof of such facts, be reviewed and recalled. Fraud vitiates the most important judicial acts, when found to exist in them, and renders them void upon discovery before the proper tribunal.

So, in like manner, a final decision of the Secretary may be reviewed and revoked, upon the ground of mistake, not mere error of judgment, but that character of mistake which would afford a ground of relief in a Court of Equity.

The Courts have no jurisdiction over public lands until after the issuance of patents. Hence before the issuance of patents, the Department of the Interior is the only tribunal having jurisdiction to review the decision of a former secretary, or to revoke or recall its own decision, when obtained by fraud or mistake."

In the case of the State of Oregon, 5 Decision Dept. Interior, page 300, acting Secretary Muldrow, in a communication addressed to the Governor of Oregon, holds that the lists of lands certified to the state as swamp lands coming within the grant, may be superseded and cancelled on the ground of fraud or mistake, by the action of the Secretary of the Interior, referring to the above decision of Secretary Lamar, in the case of Oregon, 5 Id., p. 31.

In State of Oregon, 5 Id., p. 374, after investigation had been made in regard to said List No. 5, certified to the State of Oregon referred to above, Secretary Lamar, in a communication addressed to the Governor of Oregon, requested the state, through its agent, to show cause why said lists should not be revoked and cancelled.

In State of Oregon, 7 Decision, Dept. Interior, 572, the same case came before Secretary Vilas, upon the hearing to show cause why the lists should not be set aside and cancelled. Upon the evidence, he finds that the lists certified to the State of Oregon were based upon acts which were false and fraudulent, in returning the lands as swamp lands by the agent who made the examination.

Secretary Vilas uses the following language (pp. 576, 577): "The government ought not to be and cannot be bound by the act of certification brought about by such means. It must be revoked and cancelled, as would very promptly have been done by the secretary who signed it if the facts had been disclosed to him while in office.

Some question has been raised of my jurisdiction to make this order. *This question has been repeatedly considered by my predecessors in office, and but one conclusion was ever reached.* In the case of the State of Michigan recently decided, I have expressed to some extent the reasons which seem to me to support the jurisdiction of the department to correct such an

error. To that decision I need add nothing for the purposes of this case. Suffice it to say that unless the certification may be revoked, it would appear necessary to follow it by patent and thus invest the state with possession of a grant which ought immediately to be set aside by a Court of Equity. If such be the law, the state, her grantees, are not without remedy, and my assumption of jurisdiction can be reviewed and corrected by the Courts. It ought to require nothing less than a mandate from the Court of last resort to compel the head of this department, charged with the duty of caring for the interests of the government, and truly identifying the lands it has granted, to become an instrument for so great an outrage upon its grants as the facts here disclosed, show a patent would be. The certification of the List No. 5, of Lake View district, is accordingly revoked and cancelled, and that list entirely set aside. You will prepare another list, in which you will include such lands only as by satisfactory evidence drawn from all reports and information at hand, are unquestionably shown to be swamp or overflowed and unfit for cultivation."

In State of Minnesota, 6 Decision, Dept. Interior, p. 37, application was made on the part of the state for the issue of patents for lands contained in List Nos. 19 and 20, which had been certified to the state as lands coming within the swamp land grant. The issue of patents upon such lists was suspended on the ground that *the field notes upon which such lists were based were false and fraudulent.* From this action of suspending the issue of patents, the state appealed to the Secretary of the Interior, urging "that said list has been approved by the Secretary and certified to the state as swamp and overflowed lands, and that the consideration of this matter was beyond your jurisdiction."

Acting Secretary Muldrow held, however, that "The Sec-

retary of the Interior has jurisdiction to review the decision of a former Secretary, or to revoke and recall its own decision, when obtained by fraud or mistake, and if the record discloses such facts, the department will take jurisdiction irrespective of the authority or jurisdiction of the Commissioner," and he directed an examination to be made to determine whether the field notes, upon which the list had been based, were false and fraudulent.

In State of Wisconsin vs. Wolf, 8 Decision, Dept. Interior, p. 555, Wisconsin had adopted the field notes as the basis of adjustment of the swamp land grant, and in addition thereto, by agreement made between the Secretary of the Interior and the Governor of Wisconsin, a commission was appointed to make final settlement and adjustment of the swamp lands belonging to the state. Claim was made upon a homestead entry to a parcel of land which was decided by the commission to be swamp. The state claimed that the action of the commission was final. The Secretary of the Interior (Secretary Noble) decided that the action of the commission was not final, and that investigation into the character of the land may be had.

He says (pp. 556 and 557): "The state is not entitled to lands not granted, nor can the Secretary of the Interior, by agreement enlarge its grant. *It is his duty to finally determine what lands passed to the State of Wisconsin as well as to other states under and by virtue of the swamp land act*, and though he may adopt certain general methods for identifying these lands, yet the adoption of such methods does not deprive him of the right, *or relieve him of the duty of resorting in certain cases to other and different methods*, nor is the adoption of any such general method of adjustment, though by agreement between the officers of the respective governments, *a contract binding on the general government.*

The Secretary of the Interior, notwithstanding such agreement, may at his discretion, any time before swamp lands are certified to the state, adopt such methods, resort to such means and employ such agencies as in his judgment are best calculated to enable him to reach a correct conclusion as to the real character of any particular tract of land claimed under the swamp land act.

The views above expressed result from the nature of the duties devolved by law on the Secretary of the Interior, and are sustained by numerous rulings of the department. *Lachance vs. State of Minnesota, 4 L. D., 479; State of Oregon, 5 Id., 31; Hardin Co., Id., 236; State of Michigan, 7 L. D., 514.*

Even after selections have been approved and certified to the state as swamp and overflowed lands, which is a stronger case than the one here, the Secretary may in certain cases recall and revoke his approval and on a proper showing refuse patents for lands included in approved lists, and may cause such lists to be cancelled. State of Oregon, supra; State of Minnesota, 6 L. D., 37; State of Oregon, 7 L. D., 572; State of Michigan, supra."

In the State of Michigan, 7 Dec. Dept. Interior, Secretary Vilas, speaking upon this question, says (p. 515): "When, however, the certification made by the Secretary is, *before patenting*, challenged for fraud or mistake, I think the right and duty remain with him to correct the identification according to the facts, so that the patent shall issue only for lands which were in truth granted by the act of Congress."

Again hs says: "The Secretary retains the power, *until a patent issues*, to correct his error in the attempt to identify the granted lands by conforming his certification to the truth discovered after it was made. It equally follows that

when the Secretary has, before patent, made discovery of fraud, accident or mistake, in consequence of which he has included in his certification lands not granted by the act of Congress, and has corrected the certification so as to truly and rightly identify the lands actually granted, the only right to a patent existing in the state, or which any Court would enforce, attaches *to the land actually granted and correctly identified by the amended certification.*"

In State of Florida, 12 Decisions, Dept. Interior, 565, a list of swamp lands had been approved by the Secretary of the Interior, which was afterwards revoked by his successor, on the ground that it had been made under a misapprehension of facts. The ruling followed the above decisions and held that until patent issued, the Secretary's jurisdiction over the lands continued for the purpose of their identification.

Fourth. The decisions of this Court sustain the position that the Secretary of the Interior retains the power, *until patents issue upon his lists*, to make such changes in the lists as shall be necessary to a proper identification of the lands.

He exercises this power in the performance of his duty, "to see that the law is carried out and that none of the public domain is wasted or disposed of to a party not entitled to it."

Rogers Locomotive Machine Works vs. The American Emigrant Co., 17 Sup. C't. Rep., 188.
Knight vs. U. S. Land Association, 142 U. S., 161, 178.
Orchard vs. Alexander, 157 U. S., 372, 382.
New Orleans vs. Paine, 147 U. S., 261, 266.
Heath vs. Wallace, 138 U. S., 582.
Cragin vs. Powell, 128 U. S., 691, 697 to 700.
United States vs. Marshall Mining Co., 129 U. S., 587.
Tubbs vs. Wilhoit, 138 U. S., 134, 143, 144.

Williams vs. United States, 138 U. S., 514 at 524.
United States vs. Schurz, 102 U. S., 378, 396, 401.

In Rogers Locomotive Machine Works vs. American Emigrant Co., 17 Sup. C't. Rep., 188, the controversy was between a claimant, under the swamp land grant, and a claimant under a subsequent railroad grant, the lands having been certified, under the railroad grant, as belonging to the latter grant.

The Court, speaking by Justice Harlan, says: "The Emigrant Company lays much stress upon that clause of the railroad act of 1856, exempting from its operation all lands previously reserved by the United States for any purpose. And upon this foundation, it rests the contention that no lands embraced by the swamp land act of 1850 could, under any circumstances, be withdrawn by the land department from its operation and certified to the state under the railroad act of 1856. This contention assumes that the lands in controversy were, within the meaning of the act of 1850, swamp and overflowed lands. But that fact was to be determined, in the first instance, by the Secretary of the Interior. It belonged to him, primarily, to identify all lands that were to go to the state under the act of 1850. *When he made such identification then, and not before, the state was entitled to a patent, and 'on such patent' the fee simple title vested in the state. The state's title was, at the outset, an inchoate one and did not become perfect, as of the date of the act, until a patent was issued.*"

In Knight vs. United States Land Association, 142 U. S., 161, an ejectment was brought, and the question of title was whether the land belonged to the State of California, under which the plaintiff claimed, or to the city of San Francisco, under which the defendant claimed.

The decision of the case turned upon the question whether a certificate, which had been made and confirmed by the Commissioner of the General Land Office, was of force, or whether it was superseded by a subsequent certificate, made under the order of the Secretary of the Interior.

The case involved a decision upon the power of the Secretary of the Interior, and the Court say (p. 176): "It is a well settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the government, and that the action of that department, within the scope of its authority, is unassailable in the Courts, except by a direct proceeding. *Cragin vs. Powell*, 128 U. S., 691, 699, and cases cited. Under this rule it must be held that the action of the land department, in determining that the Von Leicht survey correctly delineated the boundaries of the Pueblo grant, as established by the confirmatory decree, is binding in this Court, if the department had jurisdiction and power to order that survey."

The Court say (p. 178): "The statutes, in placing the whole business of the department under the supervision of the Secretary, invest him with authority to review, reverse, amend, annul or affirm all proceedings in the department, having for their ultimate object to secure the alienation of any portion of the public lands, or the adjustment of private claims to lands, with a just regard to the rights of the public and of private parties. Such supervision may be exercised by direct orders or by review on appeals. The mode in which the supervision shall be exercised in the absence of statutory direction, may be prescribed by such rules and regulations as the Secretary may adopt. When proceedings affecting titles to lands are before the department, the power of supervision may be exercised by the Secretary, whether these proceedings are called to his attention by formal notice

or by appeal. It is sufficient that they are brought to his notice. The rules prescribed are designed to facilitate the department in the despatch of business, not to defeat the supervision of the Secretary. For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney-General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated, which it would be immediately his duty to ask the Attorney-General to take measures to annul."

On page 181, the Court quotes this language from the case of Williams vs. United States, 138 U. S., 514, viz: "It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the land department, matters not forseen, equities not anticipated, and which are, therefore, not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice." And the Court continues: "The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the government, which is a party in interest in every case involving the surveying and disposal of the public lands."

This statement of the power of the Secretary of the Interior, is repeated and affirmed in Orchard vs. Alexander, 157 U. S., at pages 381, 382.

This case distinguishes the ruling in Butterworth vs. Hoe, 112 U. S., 150, which was a case arising under the laws relating to the Commissioner of Patents.

In New Orleans vs. Paine, 147 U. S., 261, the controversy was over the right of the land department to correct, by subsequent survey, a survey which had been previously made under the direction of the department. The Court say, speaking by Justice Brown (p. 266): "It is quite evident from this correspondence that the first survey was never formally approved by the Secretary of the Interior, or the Commissioner of the Land Office, and that no title ever vested in the plaintiff to the lands included in the survey, though defendant, having obeyed his instructions, was, of course, entitled to his pay. If the department was not satisfied with this survey, there was no rule of law standing in the way of its ordering another. Until the matter is closed by *final action*, the proceedings of an officer of a department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees of a Court open to review upon the final hearing."

In Heath vs. Wallace, 138 U. S., p. 573, the question involved was whether lands returned as "subject to periodical overflow," are swamp and overflowed lands, within the swamp land grant of September 28th, 1850. The case required a construction of said act. The Court made reference to the constructions, which had been put upon the act by the officers of the government who acted under it, and

say (p. 582): "Moreover, if the question be considered in a somewhat different light, viz: as the contemporaneous construction of a statute by those officers of the government whose duty it is to administer it, then the case would seem to be brought within the rule announced at a very early day in this Court, and reiterated in a very large number of cases, that the construction given to a statute by those charged with the execution of it, is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. For, as said in *United States vs. Moore*, 95 U. S., 760, 763, 'the officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret.'"

In Tubbs vs. Wilhoit, 138 U. S., at page 143, the Court say: "There can be no doubt but that under the act of July 4,1836, re-organizing the General Land Office, the Commissioner has general supervision over all surveys, and that authority is exercised whenever error or fraud is alleged on the part of the Surveyor-General."

Fifth. We submit that it is the obvious intent of the provisions of the act, that until patent issues, the jurisdiction of the Secretary of the Interior remains to do such acts as he may deem necessary for the proper identification of the lands to protect the public interest.

While the first section of the act provides that "the whole of the swamp and overflowed lands, made unfit thereby for cultivation, shall be and the same are hereby granted to said state," the identification of the lands, by the Secretary of the Interior, by making lists and plats, is provided for, and there

is no limitation upon the time for his action, or upon his jurisdiction over the subject of identification of the lands, other than the provision that he shall cause a patent to issue, "*and* on that patent the fee simple to said lands shall vest in said state."

The intent of the statute is:

1st. That all the lands granted shall be identified by the Secretary of the Interior, and that he shall, after identification, cause patents to issue for them.

2d. That the title to the particular lands granted shall remain subject to the Secretary's jurisdiction and action of identification, until their identification becomes fixed and made final by the patent which he shall cause to issue.

This is the obvious effect of the provision, that on that patent the fee simple to said lands shall vest in the said state.

Clearly, until the patent issues, the title under the terms of the statute is in a condition of suspense, or in the language of the Courts, it is "afloat." The manifest purpose of such suspense is to enable the Secretary to make and complete his identification. There does not seem to be any other purpose which can be attributed to the provision, that "on that patent the fee simple to said lands *shall vest in said state*," than to fix the period when the jurisdiction of the Secretary of the Interior, for the identification of the land, shall terminate, and that until that time he shall have authority to do such acts as are necessary for the proper identification of the lands.

When the patent issues the title is held to relate back and to have effect as of the date of the act, and by such relation the title is held to have passed *in presenti* under the provisions of the first section of the act.

This construction of the act entitles the Secretary of the Interior to protect the public interest, correct frauds and

mistakes in surveys, or which may occur in the land department, and "to see that the law is carried out, and that none of the public domain is wasted, or is not disposed of to a party not entitled to it."

This construction is not opposed to the cases which hold the title to have passed without the issue of a patent, or without any list approved by the Secretary of the Interior.

Railroad Co. vs. Smith, 9 Wall., 95.
Wright vs. Roseberry, 121 U. S., 488, 509.
Tubbs vs. Wilhoit, 138 U. S., 134, 137.

In those cases, the question was whether there may be identification of the lands, without certain acts of the Secretary of the Interior, when the *Secretary fails to act under the statute as the statute contemplates he shall act.* The question here is whether the Secretary has jurisdiction to act, in performing his duties prescribed by the act, until he, in the performance of such duties, causes the patents to issue.

The case of Noble vs. Union River Logging Railroad Co., 147 U. S., 165, is not in conflict with the defendant's contention. The case did not arise under the swamp land grant, nor come within the jurisdiction of the Secretary of the Interior in any respect *relating to the surveys of the public lands.* It arose under the act of March 3d, 1875, 18 U. S. Statutes, page 482, which provides that the right of way through the public lands of the United States is granted to any railroad company duly organized under the laws of any state or territory, except the District of Columbia, which shall file with the Secretary of the Interior a copy of its articles of incorporation, and due proof of its organization under the same, to the extent of one hundred feet on each side of the central line of said road.

It further provides that any railroad company desiring to secure the benefits of this act, shall within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office, for the district where such land is located, a profile of its road, and upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office, and thereafter all such lands over which said right of way shall pass, shall be disposed of subject to such right of way.

The Union R. R. Logging Co., in January, 1889, desiring to avail itself of said act, filed with the register of the land office, at Seattle, a copy of its articles of incorporation, a copy of the territorial law under which the company was organized, and the other documents required by the act, which papers were transmitted to the Commissioner of the Land Office, and by him sent to the Secretary of the Interior, by whom they were approved in writing and ordered to be filed, and were filed at once and the company notified thereof.

In the spring of 1889 following, the company proceeded to extend its line of road, made and ballasted a new roadbed of standard guage, and substituted steel rails and another locomotive in place of the rails and equipments which had been used by it for logging purposes, thus acting in the construction and equipment of its road upon the action which had been taken by the Secretary of the Interior.

In 1890, the succeeding Secretary of the Interior made an order which was served upon the company, requiring it to show cause why said approval should not be revoked and annulled. A bill was filed by the company to enjoin the Secretary of the Interior and the Commissioner of the Land Office from revoking the approval which had been made by the former Secretary.

The Court held that the Secretary who made the approval had jurisdiction to determine whether the railroad company had complied with the conditions of the Act of Congress, by which the right of way was granted, and that when he made his decision, the title to the right of way passed to the railroad company, and that the Secretary of the Interior had no further jurisdiction over the case.

The case is likened to the transfer of title by a patent of the United States. After referring to the decisions upon that subject, viz: In relation to patents for lands, and that patents can only be annulled by proceedings taken for that purpose, the Court say, at page 176: "We think the case under consideration falls within this latter class. The lands over which the right of way was granted were public lands, subject to the operation of the statute, and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, and when decided, and his approval was noted upon the plats, the first section of the act vested the right of way in the railroad company. The language of that section is 'that the right of way, through the public lands of the United States, is hereby granted to any railroad company, duly organized under the laws of any state or territory, etc.' The uniform rule of this Court has been that such an act was a grant *in presenti* of lands to be thereafter identified. *Railway Company vs. Alling*, 99 U. S., 463. The railroad company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose. If it were made to appear that the right of way had been obtained by fraud, a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained. *Moffat vs. United States*, 112 U. S., 24; *United States vs. Minor*, 114 U. S., 233. A revocation of

the approval of the Secretary of the Interior, however, by his successor in office, was an attempt to deprive the plaintiff of its property, without the due process of law, and was, therefore, void."

It will be seen that the swamp land grant is not referred to. *There is no provision in the act for the issue of a patent.* There is no question of a proper survey of or identification of the lands involved. The only act of the Secretary of the Interior, which the statute authorizes, is the examination and approval of the profile of the railroad. By such approval the right of way vests.

The case of Noble vs. Union River Logging RailroadCo., is referred to and explained in the case of New Orleans vs. Paine, 147 U. S., at page 264.

II.

The effect of the act of March 3d, 1857.

The right of the Secretary of the Interior to correct the lists, under which the plaintiff claims, and to supersede them upon the ground of fraud or mistake, continued after the adoption of said act.

The lists in question, under which the plaintiff claims, had been acted upon by the Secretary of the Interior, and had been approved and certified to the state *before* the adoption of the statute. His action, after the adoption of the statute, was his correction of those lists.

The act provides that the selection of swamp and overflowed lands granted to the several states by the act in question, of September 28th, 1850, and by an act to aid the State of Louisiana in draining swamp lands therein "heretofore made and reported to the Commissioner of the General Land Office, so far as the same shall remain vacant and unappropriated, and not interferred with by an actual settlement under any existing law of the United States, *be and the same are hereby confirmed and shall be approved and patented to the several states in conformity with the provisions of the act aforesaid as soon as may be practicable after the passage of this law.*"

11 U. S. Stat., p. 251.

1st. The terms used in the act show that it was intended to apply to lists, which at the time of the passage of the act had been made and reported to the Commissioner of the Land Office for action, but which *had not been acted upon* by the Secretary of the Interior.

It was because they had not been acted upon, and were there in the office awaiting action for approval by him that the statute is adopted, so that the delay in respect to them shall be terminated.

The statute confirms them and directs "that they *shall be approved* and patented to the several states in conformity with the provisions of the act aforesaid." That is, in conformity with the provisions of the act of September 28th, 1850, the Secretary *shall approve* the list. He is to proceed under that act.

Clearly, the act has no application to a list which the Secretary, before the passage of the statute, had acted upon, approved and certified to the state, which is the case with the lists in question, under which the plaintiff claims.

In such case, he had gone forward in the performance of

his duty, and had made an approved list and there was no occasion for the application of any such statute. It was to remedy the *failure of the Secretary to act* that the statute was adopted.

Although the list which had been approved by the Secretary of the Interior was based upon evidence of the field notes of the fraudulent survey, it was not the intention of the act to confirm that approved list, and thus take from the Secretary of the Interior the power which he possessed to correct the list because of fraud. Certainly it was a list *not acted upon and not approved* which was in the eye of the statute.

Again, it was not the purpose of the statute to confirm lists which had been reported to the Secretary of the Interior and which had been acted on by him, and rejected by him because the lists presented to him were incorrect, for fraud or mistake, or for any other cause.

2d. The construction put upon this act by the land department is that it does not apply to and does not confirm lists which had been acted upon by the Secretary of the Interior and rejected by him.

State of Arkansas, 8 Decision Dept. Interior, 387.
State of Michigan, 7 Id., 514 at 525.

See letter of Thomas A. Hendricks, Commissioner of the General Land Office, Ex. 23, record pp. 31 to 33.

Letter of Secretary of the Interior, Thompson, to the Commissioner of the General Land Office, dated Nov. 1st, 1858.

1 Lester's Land Laws, p. 563.

In State of Arkansas, 8 Decision Dept. Interior, 387, the question came before Secretary Noble whether the Act of March 3d, 1857, applied to and confirmed a list of lands selected on the part of the State of Arkansas and reported to the General Land Office as swamp land, which list bore date August 27th, 1853, and which was received at the office of the Commissioner of the General Land Office, between that date and the 13th of September, 1853, on which latter date it was returned to the Surveyor-General on the ground that the survey was defective, with the statement that until properly certified, it could not be acted upon.

The Secretary says: "It in no way appears that between that time and the date of the passage of the confirming act (March 3d, 1857) anything was done to reinstate this list as one pending in the department for approval."

The Secretary holds that the act of March 3d, 1857, does not apply to such list. He uses this language, on page 388: "In the Michigan swamp land adjustment, (7 L. D., 525), my predecessor, Secretary Vilas, held that the act of 1857 did not operate to confirm lists of lands, which had been filed in your office before the 3rd of March, 1857, *but to replace which, certain revised or amended lists had before that date been made out and filed.* The principle of this decision is that selections pending as such, as at that date of the passage of the act, and not also all lists before that time finally disposed of, were intended to be confirmed."

In the decision of Secretary Thompson, above referred to, (1 Lester's Land Laws, p. 563) the question was presented whether a list filed in the General Land Office, prior to March 3d, 1857, was confirmed by said act, and the Secretary holds that it was, "excepting so far as by the action of the Surveyor-General or of your office, taken prior to said date,particular tracts on said lists had been noted as dry, not

swampy, or not granted by the act of 1850. Notes on any list having such purport, and reports from the Surveyor-General or decision of your office, rejecting in terms the work of a particular agent as improperly, incorrectly or unreliably done, I regard as specific determination, adverse to the claim of the state to the particular tracts thereby affected. By which determinations the lists in your office have been purged and reduced in a corresponding degree."

This construction, of the act of March 3d, 1857, was adopted and applied in the case of the state of Michigan vs. Jackson, Lansing & Saginaw Railroad Co., 16 C. C. A., 345, 348, 349. No appeal was taken from this decision, and it stands as final against the state.

In the opinion, the Court referred to the views expressed upon this subject in this case of the Michigan Land & Lumber Co. vs. Rust, in which the Court say (15 C. C. A., p. 349): That the Court is "of the opinion that the act was not intended to include a list which was in the situation of the one under which the plaintiff claims. The list had some time before been acted upon by the land department, and was expected to stand, except in so far as it should be impeached for fraud or error by the resurveys. Congress knew that those resurveys were going on. For several years it had been making appropriations therefor. It was a matter of public record that the surveys, on which it was based were fraudulent, and that where the resurveys had developed the fraud and corrected the errors, all traces of the old survey were obliterated. The old survey had been rejected by competent authority. As was said in Knight vs. Association, supra, a rejected survey is no survey, and inoperative for any purpose. New lists had been made and filed in the Commissioner's office, based upon the new survey, and the plats made in conformity therewith. It was held by the Secre-

taries of the Interior, and we think with sufficient reason, that the act was not intended to confirm old lists, founded upon the first survey which had been thus superseded. It was so held by Secretary Vilas in State of Michigan, 7 Land Dec. Dept. Int., 525; by Secretary Noble in State of Arkansas, 8 Land Dec. Dep. Int., 387; and this is confirmed by the ruling of Secretary Thompson, in 1 Lester's Land Laws, 560. And further, we are of the opinion that it was not intended by this act to override the general power of the Secretary to correct frauds and mistakes in the preparation of the lists thereby confirmed, and that upon a just construction of the act such frauds and mistakes remained subject to correction."

In Knight vs. U. S. Land Association, 146 U. S., at page 109, it is held that "a rejected survey, by officers of the land department, is in law no surevy, and inoperative for any purpose. It has so been held in numerous instances and never to the contrary."

The case of Tubbs vs. Wilhoit, 138 U. S., 134, arose in relation to the act of July 3d, 1866, 14 U. S. Stat., 219, which was an act confirming selections of swamp land made under the swamp land grant of September 28th, 1850, made in the State of California, and the right of the Land Department to correct lists and plats for fraud or error, was recognized in that case by the Supreme Court. (See p. 143.)

The principle of these decisions is that the act of March 3d, 1857, applied only to lists of lands on file in the office of the Commissioner of the General Land Office, which were awaiting the action of approval by the Secretary of the Interior, that if they had been acted upon and rejected, the

act did not apply to them, and it would clearly follow that if they had been acted upon and approved, as in the case of the list in question, the act did not apply to them.

3d. This statute came to be adopted because of the cases where the states themselves, instead of adopting the field notes of the United States survey, on file in the Surveyor-General's office, as a basis of selecting the lands, so that the work of selection should be made by the Secretary of the Interior, made their own selections and forwarded their lists upon such selections to the Commissioner of the General Land Office, which lists remained in the office of the Commissioner of the General Land Office without being acted upon by the Secretary of the Interior.

The states which adopted the notes of survey in the Surveyor-General's office as the basis for the action of the Secretary of the Interior, were Michigan, Wisconsin and Minnesota. The other states did not adopt the notes of survey as a basis for determining the lands which came within the grant, but took proceedings through their own officers and agents, under statutory provisions adopted by themselves, and furnished to the Commissioner of the General Land Office proofs of the character of the lands, upon which proofs the Secretary of the Interior was to make his approved lists.

1 Lester's Land Laws, p. 542.
Lachance vs. Minnesota, 4 Dec. Dept. Interior, 479.

The proofs presented by the states were furnished to the Commissioner of the General Land Office.

The Secretary of the Interior did not act upon these proofs, or so greatly delayed his action upon them that the states failed to obtain approved lists of lands coming within the grant from the Secretary of the Interior.

It was to remedy this condition in relation to approving lands to those states that the act of March 3d, 1857, was passed.

This construction has been put upon the act by the Supreme Court, and by the Land Department.

Tubbs vs. Wilhoit, 138 U. S., 134 at 137, 138.
Martin vs. Marks, 97 U. S., 345 at 347, 348.
1 Lester's Land Laws, p. 558.

III.

The State of Michigan, by its conduct, was estopped to claim title to the lands under the lists upon which the plaintiff's claim is based, and the plaintiff, as the grantee of the state, is also estopped. His rights are no other than such rights as the state had at the time the state patented the lands to him.

The evidence is undisputed that the resurveys were made by the land department for the purpose of correcting the frauds in the original surveys, and that they were instituted upon the representation of the state "that large districts of lands, lying within the limits of the State of Michigan, have been returned by some of the deputy United States surveyors to the General Land Office as surveyed, where no surveys whatever have been made, or where surveys have been so imperfectly done as to be utterly valueless."

Exhibit 57, pp. 64, 65.

These surveys were carried on under appropriations made by Congress from time to time, from 1845 to 1856, with the knowledge of the state.

See the appropriations before cited, p. 70, *supra.*

An appropriation of twenty thousand dollars for such purpose, was made on September 30th, 1850, two days after the passage of the swamp land grant in question.

9 U. S. Stat., p. 530.

The result of the examinations and resurveys is stated by the Surveyor-General to be that:

(P. 115.) "In some instances, in the original survey, lakes, covering many hundreds of acres, have been laid down upon the maps where none existed, thus covering with water a large area of beautiful country which, but for these frauds, might long since have been opened for sale and settlement."

(P. 117). "In the townships resurveyed and corrected, portions of the lines were run and found to be established, other lines were run, but seemed never to have been corrected, while other portions of the survey were found to be entirely fraudulent, no lines ever having been run."

(P. 118.) "The examinations in the four districts, embraced in my present estimate, represent that in many of the townships no lines have ever been run. They also serve to show, as all examinations of defective survey in this state have ever done, that the field notes of the original surveys are no index to the true and real character and value of the country of which they purport to give a faithful description."

Speaking of the district in which the township in question (18-3) is situated, the Surveyor-General says (pp. 88, 89): "I beg leave to say that from examinations that have been made by William A. Burt within the last three months, it appears that most of the field notes, originally returned to this office by H. Nicholson, N. Brookfield and J. Brink, as containing a true description of surevys made by them under their respective contracts, dated 20th July, 1838, 30th November, 1839, and 13th of December, 1839, are *fictitious and*

fraudulent. * * * The districts above referred to are all bounded on the east by the principal meridian, and lie between townships No. 17 and 24 north, in the State of Michigan."

H. Nicholson was the deputy surveyor who surveyed the township in question.

See plaintiff's Ex. 30, pp. 40, 47.

The Surveyor-General further says (p. 89): "I have returns from Mr. Burt up to the 3d of last month, and the surveys of every district and of almost every township examined by him, previous to that date, proved to be fraudulent."

After referring, on pp. 89 and 90, to field notes received from Mr. Burt, describing examinations made by him in districts which were surveyed by Henry Nicholson, who surveyed the township in question, the Surveyor-General says (p. 90): "The returns of surveys in seven districts, embracing ninety-one townships, are grossly fraudulent—the greater portion of the field notes thereof being wholly fictitious, or descriptive of lines and corners that were never established."

On Exhibit N, annexed to the Surveyor-General's report for 1849, at page 95, the township in question (18-3) is mentioned in the district surveyed by Henry Nicholson, and opposite the township appears this statement:

"This district was contracted for by Mr. Nicholson in 1838, the next year after he had made his returns of the one described above, and his work in it is found to be no better, but rather worse than it was in that. Examinations were made in every township, and there can be no doubt that it is bad throughout."

The Commissioner of the General Land Office says (p. 106): "The injury to the government, in consequence of the frauds committed in the surveys in this state, consists not only in the pecuniary loss on account of the surveys, but in the false reports of the character of the country, some of the finest portions of which being represented in the original surveys as indifferent, second and third rate land, and sometimes swamp, have been rendered unsalable for many years."

The practice of the land department from the beginning, was that upon making resurveys, the original surveys were cancelled and were not made use of for any purpose.

Exhibit 69, p. 83, which is a letter dated October 1st, 1884, from the Commissioner of the General Land Office to the Register and Receiver at Genesee, Michigan.

Exhibit 79, p. 107.
" 80, p. 112.
" 81, pp. 113 to 126.
" 86, p. 128.
" 92, p. 133.
" 93, p. 134.
" 94, p. 134.
" 95, p. 135
" 96, p. 135
" 144, p. 202
" 145, p. 203.
" 146, p. 204.
" 147, p. 205
" 148, p. 206.

In Knight vs. U. S. Land Association, 142 U. S., at 199, before cited, the practice of the land department is declared to be "the principle that a rejected survey, of officers of the

land department, is in law no survey, and inoperative for any purpose. It has so been held in numerous instances and never to the contrary."

Where new lists were made from the resurveys before patents had been issued for lands upon the old lists, *the new lists abrogated and stood in the place of the old lists.*

Exhibit 79, p. 107 to 110.
" 80, p. 112.
" 81, p. 113.
" 91, p. 133.
" 83, p. 126.
" 92, p. 133.
" 86, p. 128.
" 93, p. 134.
" 94, p. 134.
" 95, p. 135.
" 96, p. 135.

The list of lands based upon the old survey and another list of lands based upon the resurvey, were in no instance recognized as being in force. Only one list in a town, either the list made on the original survey, or the list made on the resurvey was ever recognized.

Exhibit 23, p. 31.
" 121, p. 173.
" 122, p. 174.
" 143, at p. 201.
" 149, p. 207.

This practice of the land department was known to the state authorities and was recognized by them.

Exhibit 119, p. 171.
" 120, p. 172.
" 118, p. 170.

In pursuance of this practice, the land department had a resurvey made in town 18 north, range 3 west, the town in question, and on that resurvey made a new Surveyor-General's list, and a new list approved by the Secretary of the Interior, which lists, *by their terms, superseded and stood in the place of the lists under which the plaintiff claims.*

The lists under which the plaintiff claims, included lands in township 18 north, range 3 west, the town in question. This town was erased from such lists after the new Surveyor-General's lists, made upon the resurvey, was filed.

Upon the old list, thus corrected and superseded as to town 18 north, range 3 west, the Governor of the state requested a patent to issue to the state, and a patent was accordingly issued, which omitted township 18 north, range 3 west. The approved list, made upon the resurvey, was approved after the above patent had been issued, and included lands in town 18 north, range 3 west, but did not include the lands in question. The Governor of the state requested a patent of the lands, based upon this approved list, and a patent was issued to the state accordingly.

In this manner it is shown that the state recognized this new approved list and the selections of lands that had been made according to it, assented to it, and requested and received a patent based thereon.

Exhibit 110, p. 149.
" 111, p. 153.
" 112, p. 157.
" 113, p. 157.
" 161, p. 231.
" 162, p. 234.
" 124, p. 175.
" 125, p. 177.
" 126, p. 178.
" 127, p. 178.

Exhibit 128, p. 180.
" 129, p. 180.
" 130, p. 181.

See also,
Exhibit 136, pp. 189, 190.
" 137, p. 193.
" 138, p. 196.
" 139, p. 197.
" 140, p. 198.
" 141, p. 199.
" 142, p. 200.

The state authorities, includi the Governor, Commissioner of the State Land Office ..d Legislature, in adjusting the land grant with the United States, acted upon the resurveys, and the lists made upon the resurveys, which superseded the lists made upon the original surveys and the patents issued thereon, and upon that basis obtained patents to all the lands to which the state was entitled under the grant, upon the basis of the resurveys.

See,
Exhibit 157, p. 221.
" 160, p. 226.
" 159, p. 225.

Report of the Commissioner of the State Land Office for the year 1862, p. 228.
Id. for year 1865, p. 228.
Id. for year 1866, p. 229.
Id. for year 1868, p. 229.
Id. for year 1869, p. 229.
Id. for year 1870 p. 230.
Id. for year 1874, p. 230.

It further appears by the evidence that the United States proceeded to dispose of the lands in township 18 north, range 3 west,not included in the lists made upon the resurvey of that town, and that no objection was made on the part of the state to such action of the United States.

Ex. 151, pp. 209, 211.

Ex. 151, A. p. 211.

Wm. L. Webber, pp. 239, 240, 242.

It appears distinctly from the evidence that the lands which were contained in the original lists and which were omitted from the superseding lists, were omitted because upon a resurvey they were found not to be swamp. The lands which were contained in the superseding list and were omitted from the first list, were lands which upon the original survey were not found to be swamp, and upon the resurvey they were found to be swamp. Thus, where the two lists differed, they differed because the lands constituting the difference were found to be swamp in one case and were found not to be swamp in the other case. Both lists could not be right. The state was not entitled to take under both lists. It was not intended by the Secretary of the Interior, nor understood on the part of the state, that the two lists should stand and be in force in the same town.

It is clear from the entire evidence that while the transaction was going on, it was not designed, either by the United States or by the state, that the state should take under both lists.

The state was, therefore, called upon to make its election as to which list it would request and receive patents upon.

The state did make its election, and requested and re-

ceived patents upon the second list for the lands in township 18 north, range 3 west, in 1857.

Ex. 113, p. 157.

The state never afterwards applied to the Secretary of the Interior for a patent for the lands in controversy, nor made claim to them, other than by conveying them to Edward Sparrow, on October 14th, 1887, thirty years after. See Exhibit 33, p. 53, and Exhibit 34, p. 54.

The consequence of making such election was to put the United States in a position so that it might sell the lands *not included* in the second list, which was accepted by the state. This election also put the public in a position to be assured that it might deal with the United States in reference to such lands. The United States and the public acted accordingly. Sales were made of such lands to the citizens of the State of Michigan, who bought in good faith, supposing that they had obtained the title to the lands from the United States, free from any hostile claim from any quarter, and received a patent of the United States therefor. The defendant obtained his title to the lands in question in that manner, making his purchase in good faith, under patents from the United States.

C. A. Rust, p. 240.

Oscar Palmer, p. 50.

Patents and conveyances, pp. 59 to 64.

Under such circumstances, the state and the plaintiff, as its grantee claiming under the state, is estopped from claiming the title to the lands as swamp lands.

State of Mich. vs. F. & P. M. R. R. Co., 89 Mich., 481.

State of Mich. vs. Jackson, Lansing & Saginaw R. Co., 16 C. C. A., 345 at 349 to 352.

Dickinson vs. Colgrove, 100 U. S., 578 at 580.

Kirk vs. Hamilton, 102 U. S., at 76 to 79.
Pingra vs. Munz, 29 Fed. R., 830 at 836.
Hough vs. Buchanan, 27 Fed. R., 328 at 331.
U. S. vs. R. R. Co., 37 Fed. R., 68 at 71.
Audubon Co. vs. Am. Emigrant Co., 40 Iowa, 460 at 466.
Adams vs. R. R. Co., 39 Iowa, 507 at 511, 512.
State vs. Dent, 18 Mo., 313.
R. R. Co. vs. Lyndell, 39 Mo., 329.
State vs. Galveston, 38 Texas, 12.
State of Indiana vs. Milk, 11 Fed R., 389 at 396, 397.
U. S. vs. Military Road Co., 41 Fed. R., 493.
U. S. vs. McLaughlin, 30 Fed. R., 147.
2 Herman on Estoppel, Sec. 677, 678.
U. S. vs. Willamette, &c., Co., 54 Fed. R., 807 at 811.
Cohn vs. Barnes, 5 Fed. R., 326 at 333, 334.

In the case of the State of Michigan vs. The Flint & Pere Marquette R. Co., 89 Mich., 481, the state claimed lands as belonging to it, by virtue of this swamp land grant, under lists made upon the original surveys. The defendant claimed the lands under certification of the lands by the land department, as falling under the railroad grant of June 3, 1856. The Court held the state to be estopped to set up title to the lands, upon a state of facts similar to the facts presented by this record.

In the case of State of Michigan vs. The Jackson, Lansing & Saginaw R. Co., 16 C. C. A., 345, the Court of Appeals applied the law of estoppel, as recognized by the Supreme Court of Michigan, to the same state of facts which is presented by this record.

The other authorities above cited fully sustain the principle of those decisions.

The defense of estoppel applies to this action of ejectment.

Dickinson vs. Colgrove, 100 U. S., 578, 580, 584.
Kirk vs. Hamilton, 102 U. S., 68 at 78.
Dean vs. Crall, 98 Mich., 591.
Barnard vs. Germ. Am. Sem., 49 Mich., 444.

The defense of estoppel is not required to be pleaded as a defense in this case.

2 Howell's Statutes of Mich., Secs. 7808, 7809.
Dean vs. Crall, 98 Mich., 591.
Roberts vs. Lewis, 144 U. S., 653, 656, 657.

2 Howell's Statutes, Sec. 7808, which relates to the action of ejectment, provides as follows: "The defendant may demur to the declaration as in personal actions, or he shall plead the general issue only,which shall be the same as in personal actions, and the filing and service of such plea or demurrer shall be deemed an appearance in the cause, and upon such plea the defendant may give the matter in evidence, and the same proceedings shall be had as upon the plea of not guilty in the present action of ejectment."

Sec. 7809 provides that "Upon such plea, the defendant may give in evidence any matter which, if pleaded in the present writ of right or action of dower, would bar the action of the plaintiff."

Under these provisions, no other plea than the general issue is required in an action of ejectment.

In Roberts vs. Lewis, 144 U. S., 653, the Court say (page 656): "But since 1872, when Congress assimilated the rules

of pleading, practice and forms and modes of procedure in actions of law, in the Courts of the United States to those prevailing in the Courts of the several states, all defenses are open to a defendant in the Circuit Court of the United States, under any form of plea, answer or demurrer, which would have been open to him under like pleading in the Courts of the state within which the Circuit Court is held."

IV.

Assignments of error 121 to 129 inclusive, relate to evidence offered by the plaintiff in rebuttal of the defendant's evidence, which was excluded by the Court.

The evidence had no tendency to rebut the evidence given by the defendant, and was immaterial and irrelevant.

1st. Assignment of Error 121 relates to the exclusion of Exhibit 175 A, p. 259, which contains the declaration, plea and verdict in a suit of the United States against Henry Nicholson, Jr., and his sureties, upon his bond of Deputy Surveyor. Henry Nicholson, Jr., was a Deputy Surveyor, who made the original survey of township 18 north, range 3 west, the township in question.

The evidence on the part of the defendant showed that upon complaint being made to the land department that there had been frauds in the surveys in different townships in Michigan, the department caused examinations to be made to ascertain whether such frauds had been committed, and from such examinations determined that they had been committed, and on that account caused the resurveys to be made to correct the original surveys.

This proceeding was wholly within the jurisdiction of the

land department, and its determination upon the subject was final and conclusive, and could in no manner be affected by the suit, or the result of the suit referred to in the evidence tendered.

This is conclusively established by the following decisions:

Knight vs. U. S. Land Association, 146 U. S., 161 at 176, 177, 178, 179, 182.
Cragin vs. Powell, 128 U. S., 691 at 697, 698.
Tubbs vs. Wilhoit, 138 U. S., 134 at pp. 143, 144.
See vs. Johnson, 116 U. S., 48.
Carr vs. Fife, 156 U. S., 484.

Assignments of Error 122, 123, 124, 125 and 126, relating to Exhibit 175 B, p. 264, Ex. 176, p. 271, Ex. 177, p. 272, Ex. 178, p. 273, Ex. 179, p. 274, are of like character and are governed by the same considerations.

2d. Assignment of Error 127 relates to Exhibit 180, p. 276, Assignment of Error 128 relates to Ex. 181, p. 277, and Assignment of Error 129, relates to Ex. 182, p. 278. These exhibits constitute a request made by the Commissioner of the General Land Office, under date of January 15th, 1853, to the Surveyor-General to send some person to the General Land Office, with whom conference could be had and who should bring information from the Surveyor-General's office; and the reply of the Surveyor-General to such letter by which it appears that he sent George S. Frost from his office with certain information showing the condition of the work in the Surveyor-General's office.

There is nothing in this correspondence that has any bearing upon the defence which has been made in the case. The subject of the correspondence appears to be entirely immaterial.

BENTON HANCHETT,
Attorney for Defendant in Error.